Supreme Court, U.S.
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No. 92-989

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TENNESSEE,
Petitioner,

v.

DONALD RAY MIDDLEBROOKS,
Respondent.

On Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF RESPONDENT

DAVID C. STEBBINS *
PAUL R. BOTTEI
704 18th Avenue South
Nashville, Tennessee 37203
(615) 256-9780

LIONEL R. BARRETT, JR.
LIONEL R. BARRETT, JR., P.C.
Washington Square Two
Suite 1417
222 Second Avenue, North
Nashville, Tennessee 37201
(615) 254-1471
Counsel for Respondent

* Counsel of Record

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1257 to review the judgment of the Tennessee Supreme Court below or does the judgment rest upon an adequate and independent state ground?

2. Did Tennessee's former sentencing scheme rationally narrow the class of persons exposed to a death sentence when it (a) used the broadest conceivable definition of first-degree murder, (b) made all persons convicted of first-degree murder death eligible, and (c) made death the presumptive sentence for all felony murderers (but not premeditated murderers) without requiring proof of a single element in aggravation?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional and Statutory Provisions

A) Article III of the United States Constitution

B) The Eighth Amendment to the United States Constitution

C) The Fourteenth Amendment to the United States Constitution

D) 28 United States Code § 1257

E) Tennessee Constitution, Article I, § 16

F) Tenn. Code Ann. § 39-2-201 (Michie 1982)
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Tenn. Code Ann. § 40-35-111 (Michie 1982)
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Tenn. R. Crim. P. 12.3

The Constitutional Provisions and Statutes are reprinted in Appendix A.

JURISDICTIONAL STATEMENT

This Court does not have jurisdiction under Article III of the United States Constitution and 28 U.S.C. § 1257.

STATEMENT OF THE CASE

A. Factual Background

Donald Ray Middlebrooks has suffered mental illness throughout his life, having been in and out of various mental and psychiatric hospitals [1] (R. 1832, 1838, 1983). Donald's history of psychiatric problems started as a child, when he was sexually abused by his uncle (R. 1834-1838, 2062). As an adult, Donald has been diag-

[1] His father also suffered mental illness and had been institutionalized. (R. 1838).

nosed as psychotic, paranoid schizophrenic, and suffering borderline personality disorder, and has been treated with anti-psychotic drugs, including Thorazine, Haldol, and Mellaril (R. 1955, 1956, 1975, 2003-2004, 2005, 2009, 2014, 2017, 2061, 2071, 2074, 2076). Since his late teens, he has suffered grand mal seizures after being stabbed in the head with an icepick (R. 1843, 1847, 1897, 1974, 2015, 2018, 2030, 2054, 2075).

In August 1986, Donald was discharged from the Austin, Texas, State Hospital for the third time in several months, having been diagnosed with atypical psychosis and seizure disorder (R. 1844, 1899, 1932, 2005, 2008). He moved to Tennessee, where, in April 1987, he was homeless and living with his wife Tammy in a cardboard crate located in a wooded area of Nashville, Tennessee. Donald and Tammy eked out an existence by rummaging through garbage dumpsters and trying to sell anything of value at "flea markets" which they set up along roadways.

On April 26, 1987, Kerrick Majors and several of his young friends approached one such "flea market" set up by Donald, Tammy, and Roger Brewington, another homeless person, on Gallatin Road in Nashville (R. 1346). Majors and his friends apparently broke some items (R. 1540). Tammy yelled at them to get away (R. 1346, 1359, 1421-22). Donald and Roger Brewington chased them (R. 1540). As they were running away, Brewington grabbed Kerrick Majors and put him in a headlock (R. 1359, 1424). The two men, accompanied by Tammy, then dragged Majors into a nearby wooded area (R. 1364-1366).

While in the woods, Brewington began slapping Majors, hitting him with a knife with brass knuckles in the handle, and taunting him with racial epithets (R. 1542). Over the course of several hours, Brewington repeatedly assaulted and tortured Majors (R. 1543-1552, 1559, 1560). Middlebrooks repeatedly throughout his statement denied assaulting and torturing Majors except for slapping him once when they first grabbed him, pushing him back once, and hitting him on the leg with a switch (R. 1545-1547,

1558-1559, 1567). After watching the assault for some time, Middlebrooks told Brewington finally: "Man, you know, don't torture the dude, you know" (R. 1548). Middlebrooks realized that Brewington had gone too far and grabbed a stick for his own protection and told Brewington: ". . . we had best just leave the dude alone and go." (R. 1549). Middlebrooks and Brewington got into a fight over this (R. 1549). After the fight the assault continued, and Middlebrooks pleaded with Brewington: "Roger, —uh—if you will, man, do something, don't torture him, you know. I mean if you're going to do it, do it." (R. 1551). He begged Brewington to "quit putting the boy through hell . . ." (R. 1561). Middlebrooks was afraid to try to stop him because Brewington had a knife and he did not and he was afraid of Brewington (R. 1562-1563).

Brewington eventually stabbed Majors after trying to coax Middlebrooks to stab him (R. 1552). Middlebrooks then stabbed Majors out of fear that he would be stabbed by Brewington if he did not stab Majors (R. 1552-3). ("Because if I didn't stab him, I would have been beside him, probably. I don't know. I—I wouldn't have wanted to take no chance.") (R. 1572). Majors died from one of the stab wounds, although it was impossible to determine which was inflicted first (R. 1639, 1651). Majors' body was left in the woods where it was discovered the next day (R. 1450-1454).

B. The Trial of Donald Ray Middlebrooks

Donald Ray Middlebrooks was indicted for First Degree Murder in the death of Kerrick Majors, under both theories of First Degree Murder contained in Tenn. Code Ann. § 39-2-202,[2] viz. that he did: "unlawfully, feloni-

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[2] At the time this crime was committed, Tenn. Code Ann. § 39-2-202 stated:

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burg-

ously, willfully, deliberately, premeditatedly and maliciously *or* while in the perpetration of a felony, to-wit kidnapping or larceny, . . . kill and murder the said Kerrick Lamar Majors against the peace and dignity of the State." (emphasis added)[3] (J.A. 2).

Before trial, the State issued notice [4] that it intended to seek the death penalty, identifying two statutory aggravating circumstances contained in Tenn. Code Ann. § 39.2-203(i): "(1) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of

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lary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-2-202 was amended in 1989. It now is Tenn. Code Ann. § 39-13-202 and reads:

(a) First degree murder is:

(1) An intentional, premeditated and deliberate killing of another; or

(2) A reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping or aircraft piracy;

(3) A reckless killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb; or

(4) A killing of a child less than thirteen (13) years of age, if the child's death results from a protracted pattern or multiple incidents of bodily injury committed by the defendant against such child and the death is caused either by the last injury or the cumulative effect of such injuries.

(b) A person convicted of first degree murder shall be punished by death or by imprisonment for life.

[3] Middlebrooks was also indicted for the crimes of Kidnapping, Tenn. Code Ann. § 39-2-301 in Count Two; Robbery by Use of a Deadly Weapon, Tenn. Code Ann. § 39-2-501, Count Three; and Aggravated Sexual Battery, Tenn. Code Ann. § 39-2-606, Count Four arising out of the same incident.

[4] Tenn. R. Crim. P. 12.3 requires the State to file notice 30 days before trial if it intends to seek the death penalty. Where, as here, the Grand Jury has returned an indictment for First-Degree Murder (in the course of a felony), the State has unlimited discretion whether it will seek the death penalty based upon the underlying felony murder.

mind" and (2) "the murder was committed while the defendant was engaged in committing the felony of Robbery, Larceny and Kidnapping." (T.R.P. 12).

At the conclusion of the trial phase of the proceedings the jury was instructed on both theories of First Degree Murder. The Court's charge included the following felony murder instructions:

> A person commits murder in the first degree in the perpetration of a felony if he kills any person during the perpetration of, or attempt to perpetrate certain specified felonies, including kidnapping or larceny. Kidnapping is the offense of forcibly or unlawfully confining, inveigling, or enticing away another, with the intent of causing him to be secretly confined against his will. Larceny is the offense of felonious taking and carrying away the personal goods of another, and is either grand or petit in degree.
>
> For you to find the defendant guilty of murder in the first degree in the perpetration of a felony, the State must have proven beyond a reasonable doubt the existence of the following elements:
>
> (1) that the defendant unlawfully killed the alleged victim;
>
> (2) that the killing was committed during the alleged perpetration or attempt to perpetrate the alleged kidnapping or larceny; that is, that the killing was closely connected to the alleged kidnapping or larceny, and was not a separate, distinct, and independent event, and
>
> (3) that the defendant specifically intended to commit the alleged kidnapping or larceny.

(J.A. 11-12, R. 1735-36)

The jury was also instructed on the Tennessee law of aiding and abetting.

> All persons aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders and punished as such. An aider and abbetor is one who advises, counsels, procures or encourages another to commit a crime.
>
> * * * *
>
> Constructive or actual presence, however, is not sufficient to make one a principal of the crime. There

must be some evidence, at least circumstantial, that the defendant knowingly participated in the crime. The defendant must have had knowledge of the crime being committed, and an intent to aid and abet. An aider and abettor, who has knowledge of the principal's unlawful intent, and assists the principal, is guilty in the same degree as the principal. When the aider and abettor does not share in the principal's intent, however, but is controlled by his own intent, the degree of guilt of the aider and abettor is not necessarily that of the principal. In determining the degree of the defendant's guilt, you should consider his criminal intent, and not the intent and degree of guilt of the principal offender, whom the defendant is accused of aiding and abetting.

(J.A. 6-7, R. 1728-1729)

The Jury's Verdict as to Count One [5] found Donald Middlebrooks: "guilty of murder in the First Degree in the Perpetration of a Felony, to-wit: Kidnapping as charged in Count One of the indictment." (J.A. 22-24, R. 1775)

The following day at the penalty phase of the trial, one of the two aggravating circumstances that the State relied on in seeking the death penalty was ". . . that the murder was committed during the commission of some other felony, to-wit: kidnapping is the felony that the State will be relying on . . . ," (R. 1799). The state incorporated all of the evidence that had been introduced at the first phase of the trial (R. 1803). No additional evidence was introduced to establish the aggravating circumstance that the murder had been committed during the course of a kidnapping.

Middlebrooks introduced the testimony of his half sister (R. 1826-1940) and a clinical psychologist (R. 1941-2103) in mitigation. His sister detailed Middlebrooks'

[5] The Jury also found Middlebrooks Guilty of Kidnapping as to Count Two, Not Guilty of Robbery by Use of a Deadly Weapon and all lesser included offenses as to Count Three, and Not Guilty of Aggravated Sexual Battery and all lesser included offenses as to Count Four. (J.A. 22-24)

life history, including his childhood sexual abuse, his head injuries, and his lengthy history of psychiatric problems. The clinical psychologist testified in detail about Middlebrooks' lengthy history of psychological problems, his severe personality disorders, his transient psychotic episodes, and Middlebrooks' frequent inappropriate affects (smiling and grinning at inappropriate times) which were a direct result of his mental illnesses (R. 1971).

As it had during its opening arguments, the state relied on the fact that it had already proven that the murder had occurred during the commission of a kidnapping, at the trial phase.[6]

At the close of the penalty phase, the Court instructed the jury that it must find at least one statutory aggravating circumstance before it could proceed to consider the imposition of the death penalty (R. 2198-2200) (J.A. 29, 31), and that if it found one or more aggravating circumstance, that it must weigh the aggravating circumstances against the mitigating factors (J.A. 31-34, R. 2201), and that if it found that the aggravating circumstances outweighed the mitigation, then the sentence must be death (R. 2203) (J.A. 33).

[6] During its opening statement at the penalty phase, the Assistant Attorney General made the following statements: "We will be relying on the same proof that you heard in the trial. And the trial testimony will be incorporated by reference for you to consider in that regard. It's not that the State needed this portion to go back and reprove what you've already heard. But that will be the proof that the State will be relying on, that this murder was, indeed, committed during the commission of some other felony; and as I said, kidnapping in this case is what the State would be relying on." (R. 1799)

During closing argument at the penalty phase, the same Assistant Attorney General made the following argument: "Okay, Now all the evidence that was in the trial also became a part of this hearing. The State's not required to go through again and prove to you that Kerrick Majors was killed during the time that he was kidnapped. You heard all of that. You know all of that, that the child was taken, he was drug away, that he was concealed, that he was tortured and that he was ultimately killed. There's no doubt about that, certainly not a reasonable doubt; and, I submit no doubt. . . ." (R. 2138)

Following deliberations, the jury returned its verdict:

> The form completed and submitted to the court is that entitled Punishment of Death. We the jury, unanimously find the following listed statutory aggravating circumstance or circumstances. The jury has listed in writing the murder was especially hanious [sic], attrocious [sic] or cruel and that it involved torture. The murder was committed while the defendant was engaged in committing kidnapping. The form further provides, we that the jury unanimously find that the statutory aggravating circumstance or circumstances so listed above outweigh the mitigating circumstance or circumstances. And further provides:- Therefore, we the jury, unanimously find that the punishment for the defendant, Donald Wayne [sic] Middlebrooks, shall be death.

(R. 2217) (J.A. 36-37)[7] The trial judge sentenced Donald Ray Middlebrooks to die in the electric chair (R. 2218).

C. Direct Appeal

On direct appeal, in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992), the Tennessee Supreme Court affirmed Donald Middlebrooks' conviction of First Degree Murder and Kidnapping. It then considered two issues relating to the constitutionality of the death penalty for felony murder: (1) whether the death penalty *per se* is an unconstitutional punishment for felony murder; and (2) whether a jury may constitutionally impose the death penalty upon a felony murderer on the sole basis of the statutory aggravating circumstance (Tenn. Code Ann. § 39-2-203(i)(7) (1982)) which duplicates the elements of the underlying felony murder.

In Section II of its opinion, the Tennessee Supreme Court initially addresses whether the death penalty for felony murder is *per se* unconstitutional:

[7] The original verdict form is missing from the record. The form was read by the trial judge into the record when the jury returned its verdict. That portion of the transcript is included in the Joint Appendix at pp. 36, 37.

> A majority of the present Court has held that the death penalty *per se* does not violate Article I, § 16 of the Tennessee Constitution, *see State v. Black*, *supra*, 815 S.W. 2d at 189-91, but we have not yet considered the issue of the constitutionality of the death penalty as punishment for felony murder.

Middlebrooks, supra, at 335, App. to Cert. A 34.[8] The Court then notes that "The minimum standards for determining whether a sentence of death may be constitutionally imposed under the United States Constitution are indicated by the United States Supreme Court in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) . . . ." *Middlebrooks*, 840 S.W.2d at 337; App. to Cert. A 40. Immediately thereafter, however, the Tennessee Supreme Court emphasizes that *"These federal standards do not, however, answer the question under the state constitution."* 840 S.W.2d at 338; App. to Cert. A 40 (emhasis supplied). Thus, under the Tennessee Constitution, "[W]e may not impinge upon the minimum level of protection established by Supreme Court interpretations of the federal constitutional guarantees, but may impose higher standards and stronger protections than those set by the federal constitution." 840 S.W.2d at 338; App. to Cert. A 40-41.

The analysis of the death penalty under the Tennessee Constitution has been ongoing. "The present Court first examined the constitutionality of the imposition of capital punishment under Article I, § 16 of the state constitution *State v. Black*, 815 S.W.2d 166 (Tenn. 1991)." *Middlebrooks*, 840 S.W.2d at 338; App. to Cert. A 41. When interpreting the Tennessee Constitution in *Black*, the Court made a considered decision and "elected to follow" the reasoning in *Gregg v. Georgia*, 428 U.S. 153 (1976) in independently analyzing the issue under Article I, § 16

[8] For the Court's convenience, Respondent will cite both the reported opinion in *Middlebrooks* as well as the Appendix to the Petition for Writ of Certiorari. (App. to Cert. ——)

of the Tennessee Constitution. *Middlebrooks*, 840 S.W.2d at 338; App. to Cert. A 41.[9]

Applying "the *Black* test," the Court concludes that the death penalty for felony murder is not *per se* unconstitutional under Article I, § 16 of the Tennessee Constitution. *See Middlebrooks*, 840 S.W.2d at 338-340, App. to Cert. A 42-48. The Tennessee Supreme Court relies upon numerous factors exclusive to Tennessee, in accordance with *Black*. *Middlebrooks*, 840 S.W.2d at 338-340, App. to Cert. A 42-47. The Tennessee Supreme Court concludes that, "[T]he death penalty for felony murder in Tennessee does not *per se* violate Article I, § 16 of the Tennessee Constitution." *Middlebrooks*, 840 S.W.2d at 340, App. to Cert. A 47. *See also*, 840 S.W.2d at 341, App. to Cert. A 48.

The Court then turns to the question whether the Tennessee capital sentencing statute does not "sufficiently narrow the population of death-eligible defendants under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution," given the "duplication of the elements of the offense by" the felony-murder aggravating circumstance. *Middlebrooks*, 840 S.W.2d at 341, App. to Cert. A 48-49. After acknowledging that it had previously rejected such arguments on other grounds, the Tennessee Supreme Court succinctly announces its judgment:

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, *see* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing as well.

Middlebrooks, 840 S.W.2d at 341, App. to Cert. A 49-50.

[9] Applying the Tennessee Constitution in *Black*, the Tennessee Supreme Court upheld the death penalty, because "the legislative and constitutional history of Tennessee indicates a clear intent that the death penalty is, in some cases, an appropriate form of punishment," and there was "nothing in the constitutional legislative history mandat[ing] that death is invalid *per se* as cruel and unusual under Article I § 16." *Middlebrooks*, 840 S.W.2d at 338; App. to Cert. A 41.

Having announced its conclusion that such procedure violates the Tennessee Constitution, the Court next undertakes to demonstrate that its conclusion is consistent with authorities in other jurisdictions. The Court cites and excerpts as a basis for its decision the reasoning from Tennessee's "sister state" of North Carolina in *State v. Cherry*, 257 S.E.2d 551 (1979), in which the North Carolina Supreme Court reached the identical holding as a matter of North Carolina law. *See Middlebrooks*, 840 S.W.2d at 341-342, App. to Cert. A 50-51.[10]

Only after stating its holding under "Article I, § 16 of the Tennessee Constitution" and citing *Cherry* does the Tennessee Supreme Court discuss Eighth Amendment caselaw and its requirement of "genuine narrowing," as stated in *Zant v. Stephens*, 462 U.S. 862 (1983). *Middlebrooks*, 840 S.W.2d at 342-346, App. to Cert. A 51. Even then, the Court alludes to the reasoning of a Wyoming State Supreme Court Justice (later adopted by the Wyoming Supreme Court, *see, Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991))—not federal law—as support for its conclusion that "Tennessee's statute fails to narrow the class of persons eligible for the death penalty." *Id.* at 342, *citing Engberg v. State*, 686 P.2d 541, 560 (Wyo. 1984) (Rose, J., dissenting), App. to Cert. A 52.

The Court next proceeds to review the history of the narrowing requirement, relying upon Professor Richard Rosen's article, *Felony Murder And The Eighth Amendment Jurisprudence of Death*, 31 B.C.L.Rev. 1103 (1990). *Middlebrooks*, 840 S.W.2d at 342 et seq., App. to Cert. A 52. In discussing the rationale adopted to invalidate an Arkansas death sentence in *Collins v. Lock-*

[10] As a historical matter, the territory of Tennessee was annexed by North Carolina in 1776, and then ceded by North Carolina to the United States in 1789, with a territorial government being created in 1790. Between 1776 and 1790, the North Carolina Constitution was the law of the land in Tennessee. The Tennessee Constitution was then modeled upon the North Carolina Constitution. Laska, *The Tennessee State Constitution* (Greenwood Press: 1990) at 2. Not surprisingly, the Tennessee Supreme Court has looked to North Carolina law as a foundation for its judgment.

hart, 754 F.2d 258 (8th Cir. 1985)—but later repudiated by the Eighth Circuit—the Tennessee Supreme Court notes: "This Court has previously refused to follow the *Collins* rationale by finding it inapplicable *under the Tennessee Constitution*." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 61 (emphasis supplied). It then examines this Court's Eighth Amendment ruling in *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and concludes that "*Lowenfield* is inapposite and provides no rationale for constitutionality *under the Tennessee Constitution*." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 62 (emphasis supplied).

Having concluded that the *Lowenfield* rationale provides no guidance on the narrowing question under the Tennessee Constitution, the Tennessee Supreme Court holds that the application of the felony murder aggravating circumstance to a person convicted of felony murder in Tennessee "does not narrow the class of death-eligible murders sufficiently under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution, because it duplicates the elements of the offense." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 63. The Court reiterates that such application of the felony-murder aggravating circumstance "is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder." *Id.*

In a separate opinion, Justices Reid and Daughtrey acknowledge that the Court's judgment is based upon the provisions of the Tennessee Constitution: "This holding based on Article I, Section 16 of the Tennessee Constitution is a step toward limiting the jury's discretion in imposing capital punishment to a 'demonstrably smaller and more blameworthy' class of murders." *Middlebrooks*, 840 S.W.2d at 350, App. to Cert. A 75 (Reid, C.J. and Daughtery, J., concurring and dissenting).

In its judgment order, the Tennessee Supreme Court affirms that its judgment is independently based upon its interpretation of Article I, § 16 of the Tennessee Constitution: "[T]his Court affirms appellant's conviction, but reverses the sentence on the grounds that the aggravating circumstance set out in Tenn. Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder." (J.A. 38, 39)

SUMMARY OF THE ARGUMENT

The judgment of the Tennessee Supreme Court rests upon the adequate and independent State ground of Article I, § 16 of the Tennessee Constitution. This Court lacks jurisdiction to review that judgment under Article III of the United States Constitution and 28 U.S.C. § 1257.

The Tennessee Supreme Court concluded that, because the Tennessee Legislature prohibited enhancement of non-capital sentences by the use of facts that are elements of the underlying offense, *See* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), Article I, § 16 of the Tennessee Constitution prohibits such duplication for purposes of enhancement in capital sentencing. This result was reached entirely by interpreting the Tennessee Constitution in the light of Tennessee statutes. It was independently supported by a second line of state constitutional analysis in which the Tennessee Supreme Court referred to the non-federal reasoning of the North Carolina Supreme Court in *State v. Cherry*, 257 S.E.2d 551 (1979), and to the opinion in *Collins v. Lockhart*, 754 F.2d 257 (8th Cir. 1985)—which the Tennessee Supreme Court explicitly acknowledged had been overruled as an authoritative federal constitutional precedent—before proceeding also to take account of the reasoning of such opinions of this Court as *Lowenfield v. Phelps*, 484 U.S. 231 (1988). The unambiguous and repeated language of the Tennessee Supreme Court makes clear that it is not relying upon federal law, but is looking to the reasoning of *Cherry* and *Collins* as a basis for judgment under the Tennessee Constitution. The Tennessee Supreme Court reiterates that it is rendering its judgment

under "the Tennessee Constitution" and that it is looking to federal constitutional cases, such as *Lowenfield* only for whatever persuasive force their reasoning may have as applied to Article I, § 16, which the Tennessee Supreme Court specifically says twice, is not construed *in pari materia* with the Eighth Amendment. Because the Tennessee Supreme Court did not feel compelled by federal law to interpret Article I, § 16 as it did, Article I, § 16 provides an adequate and independent state ground for the judgment. That the Tennessee Supreme Court *also*, as an alternative holding, found that the Tennessee statute violated federal Eighth Amendment principles, does not suffice to confer jurisdiction on this Court.

If the Court should conclude that it does have jurisdiction and reaches the Eighth Amendment issue, the alternative holding of the Tennessee Supreme Court that Donald Middlebrooks' sentence of death offends not only Article I, § 16 of the Tennessee Constitution but also the Eighth Amendment must be affirmed.

This Court's Eighth Amendment jurisprudence from *Gregg v. Georgia*, 428 U.S. 153 (1976), through *Arave v. Creech*, 507 U.S. ——, 113 S. Ct. 1534 (1993) has consistently required that state death sentencing systems "genuinely narrow" the class of persons eligible for the death penalty in a manner that rationally justifies the imposition of a more severe sentence in some cases than in others. Tennessee has failed to do this.

Tennessee defined the class of death eligible murderers as all first degree murderers. Tenn. Code Ann. § 39-2-202 (b) (1992). This class includes two broad categories of murderers: 1) those who kill with premeditation, malice, deliberation, and willfulness, and 2) those whose killings are committed in the course of a long list of felonies. The state need prove no *mens rea* for felony murderers other than the intent to commit the underlying felony. Tennessee also makes all accomplices equally culpable as principals. The class is broader than the class of murderers eligible for the death penalty at the time of *Furman*. Tennessee's only means of narrowing this broad class of murderers for capital sentencing purposes is to

require proof of one statutory aggravating circumstance at the penalty phase before the jury can consider the imposition of the death penalty. Tenn. Code Ann. § 39-2-203(i) (1982).

For premeditated murderers, this is a genuine and meaningful requirement because it necessitates proof of aggravating elements not encompassed by proof of the first degree murder itself. For felony murderers, the requirement of proof of a statutory aggravating circumstance is made illusory and meaningless by the felony murder aggravating circumstance which authorizes a sentence of death without proof of any additional fact or element by the state.

The Tennessee Supreme Court could find no principled basis for this distinction under either Article I, § 16 of the Tennessee Constitution or the Eighth Amendment. By automatic subjecting of all felony murderers to a capital sentence that cannot be imposed on any premeditated murderer without proof of additional aggravation going beyond the base elements of first degree murder, Tennessee has failed to "genuinely narrow" the class of persons eligible for capital sentencing in the manner required by the Eighth Amendment to insure a rational and even-handed administration of the death penalty.

ARGUMENT

I. THE JUDGMENT BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND, AND THIS COURT THEREFORE LACKS JURISDICTION TO REVIEW THE JUDGMENT BELOW

Under Article III of the United States Constitution and 28 U.S.C. § 1257, this Honorable Court must dismiss the Writ of Certiorari for lack of jurisdiction, because the Tennessee Supreme Court's judgment below rests on an adequate and independent state ground. The Tennessee Supreme Court's judgment rests upon Article I, § 16 of the Tennessee Constitution, which provides an alternative, independent, and adequate state ground for the judgment below.

A. This Court Lacks Jurisdiction To Review a State Court Judgment Which Rests on an Adequate and Independent State Law Ground of Decision

Under Article III of the United States Constitution and 28 U.S.C. § 1257, "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman v. Thompson,* 501 U.S. ——, 111 S.Ct. 2546, 2553-2554 (1991); *Fox Film Corp. v. Miller,* 296 U.S. 207, 210 (1935); *McCoy v. Shaw,* 277 U.S. 302, 303 (1928); *See Sochor v. Florida,* 504 U.S. ——, 112 S.Ct. 2114, 2119-2120 (1992). "[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487, 489 (1965), *quoting Cramp v. Board of Public Instruction,* 368 U.S. 278, 281 (1961) (citation omitted).

Thus, when a State Court judgment invokes both state and federal law as alternative bases for its judgment, this Court's jurisdiction fails. *Sochor v. Florida,* 504 U.S. ——, 112 S.Ct. at 2119-2120 (federal jurisdiction precluded if, in state judgment, "the state ground is an alternative holding"); *Harris v. Reed,* 489 U.S. 255, 264 n. 10 (1989) ("a state court need not fear reaching the merits of a federal claim in an *alternative* holding," thereby preventing federal review by invoking a state law ground "as a separate basis for decision.") This Court cannot review any state judgment grounded on an adequate and independent state ground, "even though the State court may have also summoned to its support an erroneous view of federal law." *Radio Station WOW v. Johnson,* 326 U.S. 120, 129 (1945). *Cf. Colorado v. Nunez,* 465 U.S. 324 (1984) (per curiam) (dismissing writ of certiorari as improvidently granted, with concurring Justices noting that state law judgment inconsistent with federal law).

This Court's inability to review such judgments derives from two principles. First, this Court only reviews *judgments* of the state courts. 28 U.S.C. § 1257; *Coleman,* 111 S.Ct. at 2554 ("When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257 it is reviewing a *judgment.*"); *Black v. Cutter Laboratories,* 351 U.S. 292, 297-298 (1956) ("This Court . . . reviews judgments, not statements in opinions."); *Fashnacht v. Frank,* 23 Wall. (90 U.S.) 416 (1874). Second, this Court is constitutionally compelled not to render advisory opinions. *Henry v. Mississippi,* 379 U.S. 443, 446-447 (1965); *Bell v. Maryland,* 378 U.S. 226, 237 (1964).

Consequently, if a state court judgment rests on an adequate and independent state law ground, "resolution of a federal question cannot affect the judgment, [and] there is nothing for the Court do do." *Coleman,* 501 U.S. at —, 111 S.Ct. at 2554. As this Court has stated:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977), *quoting Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). Therefore, in the context of direct review of a state court judgment, "the independent and adequate state ground doctrine is jurisdictional." *Coleman,* 501 U.S. at —, 111 S.Ct. at 2554.

In reviewing a state court judgment, this Court is obliged to address the jurisdictional question whether the state court judgment rests on an independent, adequate non-federal ground. *See Douglas v. Alabama,* 380 U.S. 415, 422 (1965). To make this determination, this Court must "examine the opinion of the state court to ascertain whether a federal question was raised and de-

cided and whether the court rested its judgment on an adequate non-federal ground." *Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95, 98 (1938). This Court must examine both the structure of the State Court opinion, as well as its precise wording. *California v. Freeman*, 488 U.S. 1311, 1313 (1989) (O'Connor, J., in chambers) (finding adequate and independent state ground after evaluating structure of California Supreme Court opinion); *See Coleman v. Thompson*, 111 S.Ct. at 2559 (examining State court opinion).

When a State Court invokes a state ground for judgment, that State ground is independent of federal law if the State Court has not "felt *compelled* by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (emphasis supplied); *Dept. of Mental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965) (State law ground not independent if "State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution"); *United Air Lines v. Mahin*, 410 U.S. 623, 630-631 (1973) (state ground not independent if state court under mistaken impression that federal law compelled a particular interpretation of state law); *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 120 (1924) (state ground not independent because state court thought federal constitution required its judgment).

Similiarly, a state law ground for decision is dependent upon federal law only if a "federal law holding is integral to the state court's disposition of the matter," and "resolution of the state . . . law question depends on a federal constitutional ruling." *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). Interpretation of federal law must be "an indispensable predicate" to resolution of the state law issue before the state ground can be considered "dependent" upon federal law. *Xerox Corp. v. County of Harris*, 459 U.S. 145, 149 (1982). A state law ground is dependent on federal law only if interpretation of federal law is "necessary to the determination of the cause," and

"the judgment as rendered could not have been given without" interpreting federal law. *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. 206, 212-213 (1938); *See Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875). *See also Enterprise Irrigation District v. Farmers Mutual Canal Company*, 243 U.S. 157, 164-165 (1917).

In an effort to simplify the problem of determining when a state court judgment rests upon an adequate and independent state ground, this Court has set forth the following test for construing state court judgments:

> When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did *because it believed that federal law required it to do so.*

Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983) (emphasis supplied)[11]. If this Court determines that this test has been met, it will assume jurisdiction. If the test is not met, it will not. *Coleman*, 501 U.S. at —, 111 S.Ct. at 2555.

As this Court has explained, when applying the *Long* presumption, "[W]e merely assume that there are no such [adequate and independent state] grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision *primarily* on federal law." *Long*, 463 U.S. at 1042 (footnote omitted).

When a state court merely looks to the reasoning of federal cases to guide its interpretation of state law, it is still state law that forms the basis for the State Court

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[11] The *Long* test thus equates "interwoven with federal law" with the determination whether a State law ruling is predicated upon an antecedent ruling of federal law, i.e., whether "resolution of the state . . . law question depends on a federal constitutional ruling." *Ake*, 470 U.S. at 75.

judgment since federal law does not compel the result. *See Id.* at 1041; *Coleman,* 111 S.Ct. at 2556. Additionally, when a state court makes "an *alternative* holding," in which it "explicitly invokes" a state law ground "as a separate basis for decision," there is an adequate and independent state ground which precludes federal review. *Harris v. Reed,* 489 U.S. at 264 n. 10 (emphasis in original).

B. The Judgment of the Tennessee Supreme Court Rests Upon Article I, § 16 of the Tennessee Constitution, Which Is an Adequate and Independent State Ground of Decision

Review of the structure and wording of the Tennessee Supreme Court's judgment reveals that Article I, § 16 of the Tennessee Constitution provides an alternative, adequate and independent state ground for the judgment below.

The judgment of the Tennessee Supreme Court clearly reveals Article I, § 16 as an adequate and independent state ground supporting the judgment. Indeed, as it had done in both *State v. Black* and earlier in their opinion, the majority of the Tennessee Supreme Court repeatedly invokes Article I, § 16 of the Tennessee Constitution as a basis for its decision, making clear that Article I, § 16 provides a basis for judgment which is wholly separate and independent from the strictures of the Eighth Amendment. *See and compare Middlebrooks,* 840 S.W.2d at 338; App. to Cert. A 40 (Article I, § 16 may impose higher standards than Eighth Amendment); *Id.* at 340 App. at Cert. A 47 (citing Article I, § 16); *Id.* at 341 App. to Cert. A 48-50 (citing Article I, § 16 three times); *Id.* at 346 App. to Cert. A 62-63 (citing Article I, § 16 twice); *Id.* at 350 App. to Cert. A 75 (Reid, C.J. and Daughtrey, J., concurring) (citing Article I, § 16 as basis for judgment).

In fact, because Justices Reid and Daughtrey explicitly hold in their concurrence that Article I, § 16 is the basis for the Tennessee Supreme Court's judgment, Article I, § 16 is the narrowest basis for judgment on which a

majority agree, and must therefore be considered the basis for the Tennessee Supreme Court's judgment, which insulates the judgment from federal review. *See Franklin v. Lynaugh,* 487 U.S. 164, 191 n.1 (1988) (Stevens, J., dissenting) (when no single rationale supports judgment, holding of court considered position of justices who concurred on the narrowest grounds); *Marks v. United States,* 430 U.S. 188, 193 (1977).

The structure and wording of the opinion also demonstrate that the judgment is based primarily upon Article I, § 16, and not primarily upon the Eighth Amendment. The majority's initial holding is that enhancement of a sentence using identical elements of the offense is prohibited as a matter of Tennessee law in non-capital sentencing under Tenn. Code Ann. § 40-35-111 (1982) and Tenn. Code Ann. § 40-35-114 (1990), therefore: "Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing, as well." *Middlebrooks,* 840 S.W.2d at 341; App. to Cert. A 50. This rationale, the point of departure for the Tennessee Supreme Court's judgment, is devoid of any federal citation, any federal implications, and of any federal rationale. It is purely a matter of Tennessee law and Tennessee policy governing the sentencing of all criminal defendants convicted in Tennessee courts.

Immediately thereafter, in support of this holding, the Court cites, adopts, and explains the rationale of the North Carolina Supreme Court in *State v. Cherry,* 298 N.C. 86, 257 S.E.2d 551 (1979) an entirely non-federal decision based upon North Carolina law. In explaining *Cherry,* the Court quotes from the North Carolina Supreme Court's reasoning that "double-counting" in North Carolina unfairly disadvantaged felony-murderers, thereby creating "a flaw in the statute" which the North Carolina Supreme Court chose to remedy. By adopting the rationale of its sister state in *Cherry,* the Tennessee Supreme Court is not relying on federal law.

By stating near the end of its opinion at least twice that it is seeking a rationale "under the Tennessee Consti-

tution," *Middlebrooks*, 840 S.W.2d at 346; App. to Cert. A 62-63, the Court makes clear that it is not deciding the case "primarily on federal law" or for reasons that are "interwoven with federal law." Rather, the Court is rendering its judgment based upon Tennessee law and the Tennessee Constitution, having looked to federal cases "for the purpose of guidance" which "do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. at 1041. The fact that the Court evaluates the reasoning of the federal cases of *Collins* and *Lowenfield* to see whether they may provide a satisfactory rationale "under the Tennessee Constitution" demonstrates that the Court has considered such cases not for their precedential value, but insofar as their *reasoning* is viable for purposes of Tennessee constitutional interpretation. Indeed, because *Collins* itself has been overruled, *Collins* has no precedential value as federal law, but retains vitality only to the extent that its reasoning is valid. By citing the overruled *Collins*, the Tennessee Supreme Court by definition cannot be relying upon federal law. Rather, the Court is only seeking guidance from *Collins'* logic for purposes of interpreting the Tennessee Constitution. Under the Supremacy Clause of the United States Constitution, a State Court which elects to adopt the reasoning of a federal appeals court "does so only because it chooses to and not because it must." *Lockhart v. Fretwell*, 506 U.S. ——, 122 L.Ed.2d 180, 193 (1993) (Thomas, J., concurring).

The structure and wording of the opinion thus demonstrate that the judgment rests on Tennessee law, not federal law. Because the judgment " 'fairly appears' to rest primarily on state law," the *Long* presumption cannot be applied and this Court lacks jurisdiction. *Coleman v. Thompson*, 501 U.S. at ——, 111 S.Ct. at 2559. The Tennessee Supreme Court's judgment does not "fairly appear to rest primarily on federal law or to be interwoven with federal law." Rather, it is based primarily upon Tennessee law and the Tennessee Constitution.

Indeed, the majority and concurring opinions demonstrate that the Tennessee Supreme Court has in no way felt "compelled" to render its State Constitutional decision based upon its view of federal law. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 568. Rather, it is merely looking to federal law for a "rationale for constitutionality under the Tennessee Constitution." *Middlebrooks*, 840 S.W.2d at 346, App. to Cert. A 62. Interpretation of the Eighth Amendment is not "necessary to the determination of the cause." *Southwestern Bell Telephone Co. v. Oklahoma*, 303 U.S. at 212. Before ever mentioning any possible Eighth Amendment rationale, the Tennessee Supreme Court first holds that such duplication violates Article I, § 16. Such a judgment is given without interpreting federal law. Even though federal cases are mentioned, the Tennessee Supreme Court is "not driven by that discussion" when reaching its independent conclusion concerning the meaning of the Tennessee Constitution. *California v. Freeman*, 488 U.S. at 1314 (O'Connor, J., in chambers).

Even though the Eighth Amendment is cited in conjunction with the Tennessee Constitution near the end of the opinion, the Eighth Amendment provides nothing more than an "alternative holding" to the Tennessee Supreme Court's judgment that Donald Middlebrooks' sentence violates Article I, § 16 of the Tennessee Constitution. Because the federal holding is, at most, only an alternative holding, this Court cannot assume jurisdiction over the judgment below. *Harris v. Reed*, 489 U.S. at 264 n. 10; *Sochor v. Florida*, 112 S.Ct. at 2120 & n **, Para. 2.

Review of the Tennessee Supreme Court's judgment reveals three alternative holdings: (1) Because duplication for enhancement purposes is generally prohibited in sentencing in Tennessee, Article I, § 16 prohibits such duplication in capital sentencing as well; (2) Because application of the felony-murder aggravating circumstance to a felony-murderer irrationally disadvantages felony-murderers vis-a-vis premeditated murderers in Tennessee, such application violates Article I, § 16 of the Tennessee Con-

stitution; (3) Because it does not narrow the class of death-eligible defendants in Tennessee, application of the felony-murder aggravating circumstance to felony-murderers violates the Eighth Amendment.

In attempting to review this judgment, supported by alternative Tennessee and federal holdings, this Court cannot alter the fact that the Tennessee Legislature has prohibited the use of duplicated elements as a basis for enhancement in non-capital sentencing, or that the Tennessee Supreme Court has held that Article I, § 16 of the Tennessee Constitution therefore prohibits such duplication of elements for enhancement in capital cases. This Court also cannot alter the fact that the Tennessee Supreme Court has, after a careful review of the reasoning of non-federal cases and federal cases, adopted a rationale under Article I, § 16 that prohibits application of the felony-murder aggravating circumstance to felony-murderers. Regardless of what this Court could decide as a matter of Eighth Amendment jurisprudence, the Tennessee Supreme Court's two alternative judgments based upon the Tennessee Constitution will remain intact. Because "the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 566. Therefore, this Court's jurisdiction fails.

The judgment below is not a judgment in which the State Court:

(1) "[N]owhere suggested a state rule governing decision." *Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986);

(2) "[D]id not cite the State Constitution at all." *California v. Brown*, 475 U.S. 1301, 1305 (1986) (Rehnquist, J., in chambers); *Washington v. Chrisman*, 455 U.S. 1 (1982);

(3) Cited no State authority at all. *California ex rel. Cooper v. Mitchell Bros. Santa Ana Theater*, 454 U.S. 90 (1981);

(4) Made only one brief and ambiguous statement referring to state law as a basis for decision. *Quinn v. Millsap*, 491 U.S. 95, 100-101 n. 6 (1989);

(5) Invoked a governing principle of law, but never referred specifically to a State Constitutional guarantee or rule of procedure. *Ohio v. Johnson*, 467 U.S. 493, 497 n. 7 (1984); *Harris v. Reed*, 489 U.S. 255 (1989);

(6) Failed to mention a state constitutional provision or the State constitution in general as a basis for decision, and only cited state cases which relied upon the United States Constitution. *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 2798 (1990);

(7) Mentioned the state constitution once, and then mentioned it again in conclusion, but cited only state or federal cases construing federal law. *Florida v. Riley*, 488 U.S. 445, 447 n.1 (1989); *Texas v. Brown*, 460 U.S. 730, 732 n. 1 (1983); *New Jersey v. Portash*, 440 U.S. 450, 453 n. 3 (1979);

(8) Cited only a state constitutional provision which is coextensive and which the State court construes in *pari materia* with its federal counterpart, *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S.Ct. 2638, 2643 n. 4 (1990); *Maryland v. Garrison*, 480 U.S. 79, 83-84 n. 6-7 (1987); *Michigan v. Chesternut*, 486 U.S. 567, 571 n. 3 (1988);

(9) Consistently referred to the federal constitution as supporting its ruling, and gave no indication that its state constitution provided rights which "were distinct from, or broader than" rights guaranteed by the federal constitution. *Kentucky v. Stincer*, 482 U.S. 730, 735 n. 7 (1987); *Delaware v. Prouse*, 440 U.S. 648, 651-653 (1979);

(10) Mentioned the State constitution only once, and then only in conjunction with the federal

constitution, where both state and federal constitutions were cited for the same propositions. *New York v. Class*, 475 U.S. 106, 108-110 (1986); *New York v. P. J. Video*, 475 U.S. 868, 872 n. 4 (1986);

(11) Never mentioned the State constitution "on its own apart from federal law." *Asarco v. Kadish*, 490 U.S. 605, 625 (1989);

(12) Held that state action violated both State and federal constitutional protections, but drew no distinction between the state & federal constitutions. *South Dakota v. Neville*, 459 U.S. 553, 556 n.5 (1983);

(13) Referred only to the federal constitution and prior state case(s) which had only construed the federal constitution. *Maine v. Thornton*, 446 U.S. 170, 175 n. 5 (1984); *California v. Beheler*, 463 U.S. 1121, 1123 n. 1 (1983);

(14) Relied upon all federal cases, except one state case, which was decided on federal constitutional grounds. *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982);

(15) Made no statement that a state ruling was itself the basis of its judgment. *California v. Ramos*, 463 U.S. 992, 997 n.7 (1983).

Rather, the Tennessee Supreme Court: (a) repeatedly invokes Article I, § 16 of the Tennessee Constitution; (b) invokes Article I, § 16 of the Tennessee Constitution at the beginning of its analysis in relying upon Tennessee practice in non-capital cases and the reasoning of the non-federal case of *Cherry* rather than relying upon federal constitutional principles or federal cases; (c) invokes Article I, § 16 by itself in various parts of its judgment; (d) states and demonstrates that Article I, § 16 of the Tennessee Constitution and the Eighth Amendment are analytically distinct and not construed in *pari materia*; (e) cites as authority cases decided on non-federal grounds; (f) considers the rationale of federal cases insofar as they might provide a legitimate rationale for interpreting the Tennessee Constitution; and (g) reaches its state law conclusion by adopting the rationale of a case (*Collins*) which has no precedential value as federal law. As apparent from the structure and wording of its judgment, the Tennessee Supreme Court rests its judgment upon the adequate State ground of Article I, § 16 of the Tennessee Constitution, which is completely independent of federal law.

Article III and 28 U.S.C. § 1257 therefore prohibit this Court's review of the judgment below. Accordingly, because this Court has no jurisdiction to review the judgment, the writ of certiorari should be dismissed for lack of jurisdiction. *Florida v. Casal*, 462 U.S. 637 (1983) (per curiam) (dismissing writ of certiorari as improvidently granted, based upon adequate and independent state ground); *Cf. Ohio v. Huertas*, 498 U.S. 336 (1991).

II. TENNESSEE FAILED TO "GENUINELY NARROW" THE CLASS OF MURDERERS ELIGIBLE FOR THE DEATH PENALTY THROUGH THE FELONY-MURDER AGGRAVATING CIRCUMSTANCE

The Tennessee Supreme Court has concluded that the automatic application of the felony murder aggravating circumstance to a defendant whose first-degree murder conviction rested solely on a felony murder theory failed to genuinely narrow the class of felony murderers eligible for the death penalty either under Article I, § 16 of the Tennessee Constitution or the Eighth Amendment. The alternative Eighth Amendment ground, while not properly before this Court as a jurisdictional matter, is substantively correct as applied to Donald Middlebrooks. Because the history and operation of Tennessee's first-degree murder and death penalty statutes are critical to analysis of this question, *see, Zant v. Stephens*, 462 U.S. 862, 870, 875 (1983), they will be discussed first. Applying Eighth Amendment principles, Respondent will then demonstrate why his sentence of death violates the Eighth Amendment.

A. Tennessee Law of First-Degree Murder and the Operation of the Tennessee Capital Sentencing Scheme

In Tennessee, at the time of Donald Middlebrooks' conviction, the death penalty was an available punishment only for the crime of First Degree Murder. Tenn. Code Ann. § 39-2-202(b) (1982), *See* App. A. The Tennessee Legislature had broadly defined first-degree murder to include two separate classes of murderers:

> Every murder [1] perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premediated killing, or [2] committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

Tenn. Code Ann. § 39-2-202(a)(1982).[12]

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[12] At the time of this Court's decision in *Furman* in 1972 the First Degree Murder statute was essentially identical except the underlying felonies that would have supported a conviction for first degree murder were limited to: "any murder in the first degree, arson, rape, robbery, burglary, or larceny." Tenn. Code Ann. § 39-2402 (1955). *See*, App. A. Donald Middlebrooks would not have been eligible for the death penalty as a kidnap-murderer in 1972.

The 1974 amendments to the first degree murder statute, enacted in light of *Furman*, increased the number of underlying felonies to include: "any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy or unlawful throwing, placing, or discharging of a destructive device or bomb." Tenn. Code Ann. § 39-2402(4) (1975). This substantially expanded the class of felony first degree murderers who would be eligible for the death penalty. Notably, the 1974 amendments ameliorated this expansion of the list of predicate felonies by introducing the requirement of a *mens rea* element that the killing be "willful, malicious, and deliberate." Because this statute provided a mandatory death sentence upon conviction of such narrowly-defined, highly culpable offenses, the Legislature enacted the present death sentencing scheme in 1977, to correct the unconstitutionality of the mandatory sentencing scheme. *See* Raybin, *New Death Penalty Statute Enacted for Tennessee*, Judicial Newsletter, University of Tennessee College of Law (May, 1977). *See, Collins v. State*, 550 S.W.2d 643 (Tenn. 1972).

The 1977 and 1982 amendments retained the expanded list of underlying felonies and restored first degree murder as an underlying felony: "any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb" but dropped the *mens rea* elements that the killing be "willful, malicious, and deliberate." Tenn. Code Ann. § 39-2402 (1975 & 1977 supp.), Tenn. Code Ann. § 39-2-202 (1982). The 1982 definition remained in effect at the time of Middlebrooks' conviction in 1989.

In the 1989 amendment, the Tennessee Legislature retained the expanded list of underlying felonies but abandoned felony murder *simpliciter* by adding the *mens rea* element of recklessness. Tenn. Code Ann. § 39-13-202(a)(2) (1989). See footnote 2, *supra*.

Tennessee classifies felony murder only as first degree murder. There does not exist a crime of second degree felony murder in Tennessee.

[13] This interpretation of Tennessee law has been consistently reaffirmed by the Tennessee Supreme Court. *See State v. Bane*, —— S.W. 2d ——, 1993 WL 126650*3 (Tenn. 1993), slip op. at 5 ("Malice and an intent to kill are not elements of felony murder."); *State v. McKay*, 680 S.W. 2d 447, 451 (Tenn. 1984); *State v. Johnson*, 661 S.W. 2d 854, 861 (Tenn. 1983); *Farmer v. State*, 296 S.W.2d 879, 883 (Tenn. 1956); *State v. Hopper*, 695 S.W. 2d 530, 535 (Tenn. Crim. App. 1985); *Tosh v. State*, 527 S.W. 2d 146, 147-148 (Tenn. Crim. App. 1975). When the offense is committed in the perpetration of a designated felony, the elements of malice, deliberation, willfulness and premeditation need not be proven, because they exist by implication. *State v. Barber*, 753 S.W.2d 659, 671 (Tenn. 1988); *State v. Norris*, 684 S.W.2d 650, 653 (Tenn. Crim. App. 1984); *Bass v. State*, 231 S.W. 2d 707 (Tenn. 1951); *Floyd v. State*, 50 Tenn. 342 (1871).

Conviction of premediated first-degree murder required proof of the elements of "malice," "premeditation," "deliberation," and "wilfulness." Tenn. Code Ann. § 39-2-202(a)(1982); *See State v. Brown*, 836 S.W.2d 530 (Tenn. 1992); *State v. West*, 844 S.W.2d 144 (Tenn. 1992). However, no *mens rea* relating to the killing was required for a conviction of felony First-Degree murder. *See, e.g., State v. Cauthern*, 778 S.W.2d 39, 47 (Tenn. 1989) ("Malice is not an element of felony murder.").[13] To find Middlebrooks guilty of First-Degree murder, the

jury was merely required to find that the killing was unlawfully committed during the course of a kidnapping and that Middlebrooks, as a party, could be held to have specifically intended to commit the kidnapping. *See, supra* at 5, 6 (J.A. 6-7, 11-12). Whether or not Middlebrooks intended to or did cause the death was irrelevant to the jury's guilt determination. As Middlebrooks' jury was instructed, Tennessee law makes principals and accomplices equally culpable. Tenn. Code Ann. §§ 39-1-103, 39-2-206 (1982) (J.A. 6-7, R. 1728-1729).[14]

This broad class of first-degree murderers was described as the class of murderers who were eligible for the death penalty. Tenn. Code Ann. § 39-2-202(b)(1982) ("A

[14] The Tennessee Supreme Court summarized the scope of the felony murder *simpliciter* doctrine in Part II of *Middlebrooks*, at 336, App. to Cert. A 36-37:

> The Tennessee offense extends both to the killer and his accomplices. A defendant who is a willing and active participant in a robbery becomes accountable for all of the consequences flowing from the robbery and may be convicted of first-degree murder where a co-perpetrator of the felony is the actual killer. *Dupes v. State*, 209 Tenn. 506, 512, 354 S.W.2d 453, 456 (1962); *Woodruff v. State*, 164 Tenn. 530, 537, 51 S.W.2d 843, 845 (1932); *Moody v. State*, 46 Tenn. 299, 305-307 (1869); *State v. Brown*, 756 S.W.2d 700, 703 (Tenn. Crim. App. 1988); *State v. Hopper*, *supra*, 695 S.W.2d at 535.
>
> The result of the felony murder doctrine in Tennessee is thus to impose a rule of strict liability allowing the underlying felonious intent to supply the required mens rea for the homicidal actus reus and to impose vicarious liability for the acts of another. *See, generally*, Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 366-369 (1978). Therefore, Tennessee's statute allows convictions for first-degree felony murder of those who commit accidental killings, and of persons who did not kill the victim and may not have intended that the victim be killed or suffer any physical harm.

The jury's verdict that Middlebrooks was guilty of first degree murder during the course of a kidnapping therefore entailed nothing more than a determination that Kerrick Majors was unlawfully killed during the course of his being kidnapped, and that Donald Middlebrooks aided and abetted in that kidnapping.

person convicted of murder in the first degree shall be punished by death or by imprisonment for life"). A conviction of first degree murder alone was punishable by life imprisonment and did not by itself expose a defendant to the jury's exercise of its discretion to impose a sentence of death. At a separate sentencing hearing, the state was required to prove at least one statutory aggravating circumstance: "No death penalty shall be imposed but upon a unanimous finding . . . of the existence of one or more of the following statutory aggravating circumstances . . ." Tenn. Code Ann. § 39-2-203(i)(1982).

If, at the penalty phase, the jury found that the State had proven at least one statutory aggravating circumstance, it then weighed the statutory aggravating circumstance(s) against mitigating circumstances. Tenn. Code Ann. § 39-2-203(e) (1982); *State v. Barber*, 753 S.W.2d 659 (Tenn. 1988). Absent proof of mitigating circumstances sufficient to outweigh the aggravating circumstances, however, death was the required punishment. Tenn. Code Ann. § 39-2-203(g) (1982).[15] A first-degree murderer was, therefore, required to overcome the presumption that death was the appropriate punishment once a statutory aggravating circumstance had been proven.

Tenn. Code Ann. § 39-2-203(i)(7)(1982), the felony murder aggravating circumstance, included an identical

[15] Tenn. Code Ann. § 39-2-203(g) (1982) stated in pertinent part: "If a jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances the sentence shall be death. . . ."

This provision was amended in 1989. The State now bears the burden of proving that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(g)(1) (1991) now reads in pertinent part:

> "If the Jury unanimously determines that: * * *
> (B) Such circumstance or circumstances have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt; then the sentence shall be death."

list of underlying felonies as were enumerated in the first degree murder statute. *See* App. A. No elements not already contained in the first degree murder definition were required to be proven. In every "death eligible" felony first degree murder case where the state sought the death penalty, the jury was compelled to find this statutory aggravating circumstance without proof of any additional fact or element by the state. This finding automatically required the defendant to establish mitigating circumstances sufficient to overcome the presumption of death as the appropriate penalty.

The Tennessee Supreme Court's interpretation of Tennessee's death penalty statute is conclusive for purposes of Eighth Amendment analysis. Indeed, "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. ——, 112 S.Ct. 1130, 1139 (1992).

B. The Class of Persons Eligible for the Death Penalty Was Not "Genuinely Narrowed"

Tennessee defined felony first-degree murder and the felony-murder aggravating circumstance to have identical elements. Proof of felony-murder entailed proof of the felony-murder aggravating circumstance. All felony murderers were thus automatically subject to the death penalty while no premeditated murderers were ever subject to the death penalty absent proof of an additional aggravating element. Thus, the class of persons eligible for the death penalty was not "genuinely narrowed" in a rational, principled manner justifying the imposition of the sentence of death on Donald Middlebrooks.

1. *The Eighth and Fourteenth Amendments Require "Genuine Narrowing"*

Under the Eighth Amendment, States must adopt procedural protections that "assure consistency, fairness, and rationality in the evenhanded operation of the state law . . . to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed . . . ." *Proffitt v. Florida*, 428 U.S. 242, 260 (1976) (Joint Opinion of Stewart, Powell and Stevens, JJ.) (citations omitted), and "promote the evenhanded, rational, and consistent imposition of the death sentences under law." *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (Joint Opinion of Stewart, Powell and Stevens, JJ.) (citation omitted).

Central to this jurisprudence is the "constitutionally necessary narrowing function" of any death penalty scheme. *Pulley v. Harris*, 465 U.S. 37, 50 (1984). As this Court stated this past term: "Our precedents make clear that a State's capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty.' " *Arave v. Creech*, 113 S.Ct. 1534, 1542 (1993), *quoting Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (discussing narrowing requirement); *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring) ("[W]e have stressed the necessity of 'genuinely narrowing the class of persons eligible for the death penalty.' "); *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. at 3060-3061 (1990) (Scalia, J., concurring).

This Court has stressed the dual function of "genuine narrowing:"

> To pass constitutional muster, a capital sentencing scheme must *'genuinely narrow'* the class of persons eligible for the death penalty and must *reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.*

Lowenfield v. Phelps, 484 U.S. at 244 (emphasis supplied), *quoting Zant v. Stephens*, 462 U.S. at 877. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." *Arave v. Creech*, 113 S.Ct. at 1542 (citing *Lewis v. Jeffers*, 497 U.S. 764, 776 (1990) and *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

"Genuine narrowing" serves its Eighth Amendment purpose by reducing the opportunities for the "freakish"

and "wanton" imposition of the death penalty in two ways. First, "narrowing" limits the class of murderers for whom the death sentence can be considered. By restricting eligibility, it assures that the death penalty cannot be imposed indiscriminately. *See, e.g., Walton v. Arizona,* 110 S.Ct. at 3090 (Stevens, J., dissenting) ("The risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons or eligible for the death penalty.") Second, "narrowing" limits the death penalty to those murderers whose culpability makes the death penalty particularly appropriate, insuring rationality by avoiding purely arbitrary sentencing. Not all murderers may be sentenced to death, and those who receive the death penalty must be rationally distinguishable from those who do not on grounds that reflect their respective degrees of culpability. As the Tennessee Supreme Court recognized in *Middlebrooks,* qualitative narrowing and not simply numerical narrowing is required. A state "must not only genuinely narrow the class of death-eligible defendants, but must do so in a way that reasonably justifies the imposition of a more severe sentence on the defendants compared to others found guilty of murder." *Middlebrooks,* 840 S.W.2d at 343 (App. to Cert. A 54-55); *See also Zant v. Stephens, supra; Arave v. Creech, supra.*

"Genuine narrowing" precludes the undifferentiated infliction of the death sentence upon the entire mass of murderers. *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976). It restricts the death penalty in a manner that assures proportionality by requiring that only the most severe offenses, or the most deserving offenders, be considered for the most severe punishment. For, it would be the height of arbitrariness if less morally culpable murderers were always subject to the death penalty while more morally culpable murderers were systematically spared.

"Genuine narrowing" thus promotes the "rational and equitable administration of the death penalty" because it insures that the death penalty can be considered for only those offenders who demonstrate the most culpability or

who cause the most harm. *Boyde v. California,* 494 U.S. 370, 377 (1990) *quoting Franklin v. Lynaugh,* 487 U.S. at 181 (plurality). By insisting that the States draw meaningful, rational distinctions between those persons who receive the death penalty and those who do not, the Eighth Amendment narrowing requirement stands at the heart of an "evenhanded, rational, and consistent imposition of death sentences under law." *Jurek v. Texas,* 428 U.S. at 276.

2. *The Tennessee Death Sentencing Scheme Did Not "Genuinely Narrow"*

The manner in which a State narrows its class of death-eligible offenders, as well as the role of aggravating circumstances in that scheme, is purely a matter of state law within Eighth Amendment requirements. *See Stringer v. Black,* 503 U.S. ——, 112 S.Ct. at 1136-1138 (comparing Mississippi, Louisiana, and Georgia narrowing schemes); *Zant,* 462 U.S. at 876-880 (discussing narrowing function and role of aggravating circumstances in Georgia scheme).

Petitioner, its *amici,* the Tennessee Supreme Court, and Respondent do not disagree that narrowing must occur either through findings at the guilt-innocence phase of trial based on narrow definitions of death eligibility, or through findings of statutory aggravating circumstances at the penalty phase. *Lowenfield,* 484 U.S. at 246. As demonstrated below, Tennessee did not genuinely narrow at either stage, because: (1) Tennessee defined death eligible murder far more broadly than any State found to have narrowed at the definitional stage; and (2) Tennessee permitted Middlebrooks' jury to base his death sentence solely on the same broad felony-murder finding it had already made at the guilt-innocence determination phase.

a. *Tennessee Did Not Narrow at the Definitional Stage*

"It is clear that Tennessee has a broad definition of murder and has not narrowed at the definitional stage." *Middlebrooks,* 840 S.W.2d at 346, App. to Cert. A 62.

This conclusive interpretation of Tennessee law, *See Stringer v. Black, supra*; *New York v. Ferber*, 458 U.S. 747, 769 (1982), is itself clearly correct. As discussed in Section II. A, *supra*, Tennessee has broadly defined the class of death-eligible murderers to include all first-degree murderers. Tenn. Code Ann. § 39-2-202 (1982), *See* App. A. Tennessee has also defined first degree murder extremely broadly, having included in this definition all premeditated, deliberate murders, as well as all killings which occurred in the course of a long list of underlying felonies regardless of the *mens rea* of the killer or the accomplice towards the killing itself. Tenn. Code Ann. § 39-2-202 (1982).[16]

Given this broad definition of death-eligible murder, it is clear that the Tennessee system is vastly different from the Louisiana system which had "define[d] first-degree murder to include a narrower class of homicides" thereby limiting death-eligibility to highly aggravated, highly culpable murders. *Lowenfield*, 484 U.S. at 241. Louisiana required proof of both (1) a specific intent to kill or inflict great bodily harm, *and* (2) one of five specific situations characterizing the murder which distinguished it from other less culpable murders.[17] *Id.* at 242.

[16] Tennessee's first degree murder statute was virtually identical to the 1975 North Carolina first-degree murder statute which this Court has described as embracing "a broad category of homicidal offenses." *Woodson v. North Carolina*, 428 U.S. 280, 286-298 and n.4 (Joint Opinion of Stewart, Powell, Stevens, JJ.) N.C. Gen. Stat. § 17 (1975), *cited in Woodson*, 428 U.S. at 286: "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ." In *Woodson*, this Court made clear that a statute which makes all such homicides death-eligible differs greatly from a statute which "is limited to an extremely narrow category of homicide." *Id.* at 287 n.7.

[17] Louisiana's statute was similar to Texas' statute, which also provides narrowing at the definitional stage by requiring findings

Tennessee's pre-1989 all-encompassing definition of first degree murder stands in marked contrast to the narrow Louisiana definitions. Tennessee had specifically rejected both narrowly defining First Degree Murder and requiring proof of any *mens rea* for felony murder when it enacted its death sentencing scheme in 1977. (*See*, fn. 12, *supra*). Since *Furman*, Tennessee has, in fact, broadened its definition of first degree murder by adding several underlying felonies, including child abuse and kidnapping. (Compare Tenn. Code Ann. § 39-2402 (1955) and Tenn. Code Ann. § 39-2-202 (1982), *See* App. A. *See, also Middlebrooks, supra* at 344, 346, App. to Cert. A 56, A 62.

The role of statutory aggravating circumstances in Tennessee is, therefore, far different from Louisiana where they serve no narrowing function. ("The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally-required narrowing process . . .") *Lowenfield*, 484 U.S. 246. As the Tennessee Supreme Court has explained, the function of Tennessee's statutory aggravating circumstances is to narrow the class of death-eligible first-degree murderers to those upon whom a death sentence may actually be imposed. *Middlebrooks* at 344, App. to Cert. A 56. Thus, as the Tennessee Supreme Court found, *Lowenfield*'s reasoning is inapplicable to the Tennessee statutory scheme where First Degree Murder is sweepingly defined. *Id.* at 346, App. to Cert. A 62. Tennessee did not provide any narrowing at the guilt stage of the proceedings.

b. ***Tennessee's Felony Murder Aggravating Circumstance Did Not "Genuinely Narrow" in a Rational Principled Manner at the Penalty Phase***

The Tennesese capital sentencing scheme is similar to that of the Idaho scheme discussed in *Arave v. Creech*,

of: (1) an intentional killing; and (2) one of several other circumstances which made the intentional killing more culpable. Tex. Pen. Code § 19.03 (1974).

supra. Like Idaho, the "class of murderers eligible for capital punishment . . . is defined broadly" and includes "a sizable class of even those murderers who kill . . . without specific intent." Aggravating circumstances are employed to distinguish among members of that class. *Arave v. Creech*, 113 S.Ct. at 1542, 1543. In Tennessee, as in Idaho, "the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not." *Id*. at 1542; *See, Middlebrooks*, at 344, App. to Cert. A 56. Statutory aggravating circumstances in Tennessee, therefore, must also satisfy the test recently reaffirmed by this Court:

> [A] State's capital sentencing scheme also must "genuinely narrow the class of persons eligible for the death penalty" . . . [and w]hen the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide *a principled basis* for doing so (citations omitted.) (emphasis supplied)

Arave v. Creech, 113 S.Ct. at 1542.[18]

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[18] In *Arave*, this Court concluded that "[a]lthough the question is close, we believe the [utter disregard aggravating circumstance] satisfies this narrowing requirement." *Arave, supra*, at 1542. This Court concluded that the Idaho "utter disregard" aggravating circumstance, as defined by the Idaho Supreme Court, narrowed the class of death eligible murderers: "Given the statutory scheme, however we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded.' That is because some within the broad class of first-degree murderers *do* exhibit feeling." 113 S. Ct. at 1543. Not only did the "utter disregard" aggravating circumstance "genuinely narrow," it did so on a principled basis that reasonably distinguished those most culpable murderers: "Idaho similarly has identified the subclass of defendants who kill without feeling or sympathy as more deserving of death. By doing so, it has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." *Id*. Idaho had complied with the Eighth Amendment because it had a principled basis for treating such defendants "as more deserving of the death penalty." *Id*.

While the question was close in Idaho, Tennessee's felony murder aggravating circumstance plainly goes beyond the constitutional borderline.[19] When it permitted Donald Middlebrooks to be sentenced to death on the basis of a felony murder aggravating circumstance which was coextensive with the felony murder *simpliciter* finding that underlay his first-degree murder conviction itself, Tennessee failed to identify a subclass of death-eligible defendants "as more deserving of death" because of their greater culpability.

Instead, the operation of the Tennessee scheme arbitrarily takes one of the two broad classes of murderers, defined by the Legislature as being equally culpable first degree murderers, and automatically makes that class subject to the death penalty without requiring proof of any additional element reasonably justifying a sentence of death. Tennessee has determined that proof of the fact that the killing occurred during the course of a felony will substitue for proof of premediation, malice, willfulness, and deliberation, so that the two crimes could be equally published. Tenn. Code Ann. § 39-2-202(b) (1982); *Middlebrooks* at 336, App. to Cert. at A 36-37; *see*, n. 14, *supra*.[20] But the Tennessee Supreme Court

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[19] The Tennessee statutory scheme under which Middlebrooks was sentenced was highly unusual in its treatment of felony-murder *simpliciter*, without more, as the basis for a death sentence. *See* Appendix B. Tennessee was the only state where proof of felony-murder *simpliciter* in and of itself would have automatically required the defendant to prove sufficient mitigating circumstances to overcome a presumption of death. As noted above, Tennessee itself no longer imposes this harsh result. Tennessee amended its statute to now require proof of "recklessness" and to require the state to prove that the aggravating circumstances outweigh the mitigating circumstances. Tenn. Code Ann. §§ 39-13-202, 204 (1991) (*See*, fn. 12 and 15 *supra*).

[20] Whatever the wisdom of this determination, the Legislature can decide, constitutionally, that felony murderers and premeditated murderers are morally equivalent for purposes of punishment. *See, Schad v. Arizona*, 501 U.S. ——, 111 S. Ct. 2491, 2503 (1991). The Tennessee Supreme Court so held below. *Middlebrooks*, at 336, 345, App. to Cert. A 36-37, 58.

also recognized that, once the Tennessee Legislature had made that determination, it was obliged to treat these two classes of "death-eligible" first-degree murderers even-handedly absent a rational penological basis for exposing one to death without additional proof of aggravation and not the other. The Tennessee Supreme Court could discern no such basis: "A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder." *Middlebrooks,* 840 S.W.2d at 345, App. to Cert. A 58.

The Tennessee Legislature has required proof of a statutory aggravating circumstance before the sentencer can consider imposition of the death penalty on a first-degree murderer. This is a genuine and meaningful requirement—a requirement of proof of something more than the first-degree murder itself—in the case of premeditated murderers. But it is an illusory and meaningless requirement in the case of the felony murderer when the felony murder aggravating circumstance is used to authorize a death sentence. *See, Engberg v. Meyer,* 820 P.2d 70, 90 (Wyo. 1991). Tennessee's statutory felony murder aggravating circumstance encompasses every single felony murderer and—by itself—authorizes the death penalty without proof of any additional element or fact by the state for every felony murderer. In stark contrast, there must be proof of an additional element or fact to make any member of the class of premeditated, malicious, willful, and deliberate first degree murderers subject to the death penalty. No automatic aggravating circumstance that "the murder was committed with premeditation, maliciousness, willfulness, and deliberation" parallels the one for felony murderers.

The question is not as Petitioner and its *amici* would have it, whether felony murder may be classed with premeditated murder as deserving capital punishment. There is little question under the Eighth Amendment that it can be.[21] But because there is no rational penological

[21] Petitioner and *amici* discuss at great length the fact that felony murder is an offense deserving severe punishment. That is not in dispute. The Tennessee Legislature agrees with them, having declared felony murder to be the equivalent of premeditated murder as the most severely punished crime in Tennessee. The Tennessee Legislature has not however declared a felony murderer to be worse than a premeditated, malicious, willful, and deliberate murderer. It has declared them to be the same—first degree murderers—for purposes of punishment under Tenn. Code Ann. § 39-2-202 (1982), as has the Tennessee Supreme Court. *Middlebrooks,* at 345, App. to Cert. A-58. This Court must take state statutory death penalty schemes as it finds them. *Pulley v. Harris,* 465 U.S. 37, 45 (1984).

basis for treating the class of *all* felony murderers more severely than the class of *all* premeditated murderers by making the former but not the latter automatically subject to the death penalty, the Eighth Amendment forbids this arbitrary result.[22]

"[P]unishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 2947 (1989). *See also Id.* at 2951. Consequently, an offender is not eligible for an enhanced punishment absent proof of an additional rational criterion which makes him or his offense more blameworthy or otherwise deserving of "a more severe sentence." *Lowenfield,* 484 U.S. at 244. In non-capital sentencing, therefore, a State may constitutionally enhance a punishment, so long as it establishes additional facts which demonstrate that the offense actually "inflict[ed] greater individual and societal harm"

[22] Petitioner also argues under *Payne v. Tennessee,* 501 U.S. ——, 111 S. Ct. 2597 (1991), that felony murderers should be punished more severely because they have caused more harm to society because they have committed another felony. The Tennessee Legislature has already taken into account the fact of the separate felony by using it to elevate Middlebrooks' actions to the equivalent of premeditated murder. Second, this is a policy decision that the Tennessee Legislature simply has not made. It has declared felony murder and premeditated murder to both be first degree murder under Tenn. Code Ann. § 39-2-202 (1982). The Tennessee Supreme Court has agreed with that decision. *Middlebrooks* at 345, App. to Cert. A-58. ("A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, deliberate murder.").

than the harm attaching to facts which constitute the elements of the offense. *Wisconsin v. Mitchell,* 508 U.S. ——, 113 S. Ct. 2194, 2201 (1993).

Just as non-capital enhancement demands proof of additional harm by a defendant, application of an aggravating circumstance to permit a sentence of "death, surely the most severe 'enhancement' of all," *Id.*, at 2200, demands proof of harm greater than that arising from mere proof of a death-eligible offense. Because there was no narrowing at the definitional stage, and because no additional rational criterion establishing greater culpability was proven by the felony-murder aggravating circumstance at the sentencing stage, no greater harm has been identified to reasonably justify enhancing the punishment of all felony murderers over all premeditated murderers.[23] This procedure, therefore, violated the Eighth Amendment.[24]

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[23] Vague aggravating circumstances are constitutionally infirm for this exact reason. When an aggravating circumstance is vague, it applies to all death-eligible defendants, thereby failing to provide a basis to rationally distinguish from among the entire class of defendants any defendant as being more culpable, and thus "more deserving of death." *Arave v. Creech,* 113 S.Ct. at 1543.

It is also for this reason that a State cannot make a defendant's gender, race or religion an aggravating factor, because neither race nor religion *ipso facto* enhances a defendant's blameworthiness for his offense. *Cf. Zant v. Stephens,* 462 U.S. at 885.

[24] The class of felony murderers who are "death eligible" in Tennessee is as broad as any class of felony murderers in the nation. (*See* discussion *supra,* at Section II.A.; App. B.) It includes not only the most culpable felony murderers—those who commit a felony and who intend to and do commit a murder in the course of the felony—it also includes those accomplices who had an intent to commit the underlying felony and no intent to commit murder itself and a significant number of murderers who would not have been eligible for the death penalty at the time of this Court's decision in *Furman.* (*See* discussion *supra* at Section II.A.) The class of felony murderers is so broad that there must also be some rational criterion for meaningfully distinguishing among the members of the class ("Our cases have recognized that not all felony murderers are of identical culpability, compare *Tison v. Arizona* . . ., with *Enmund v. Florida* . . ." (citations omitted)), *Schad v. Arizona,* 111 S. Ct. at 2503 (plurality).

Because of Tennessee's automatic aggravating circumstance for felony murderers, all felony murderers are treated as *more* culpable (morally *worse*) than all premeditated murderers for purposes of capital punishment. There is no reasonable basis upon which to treat all felony murderers as more culpable than all premeditated murderers, and the Tennessee Supreme Court has found no justification for such disparate treatment of first-degree murderers under Tennessee law. *Middlebrooks,* 840 S.W. 2d at 345, App. to Cert. A 58.

Since there is no rational penological ground for distinguishing the class of felony murderers from the class of premeditated, malicious, willful and deliberate murderers on the basis of the moral culpability of the offender, the felony murder statutory aggravating circumstance fails to reasonably justify subjecting one but not the other to capital punishment without proof of any further aggravation. The class of felony murderers thus made indiscriminately subject to the death penalty is itself larger than the class of death-eligible felony murderers at the time of *Furman. Compare* Tenn. Code Ann. § 39-2402 (1955) and Tenn. Code Ann. § 39-2-202(a) (1982), *see* App. A. It is not narrower. The sentencer is given no more guidance than the pre-*Furman* sentencer because the finding of the felony murder aggravating circumstance is compelled by the finding of first degree murder at the guilt-innocence phase of the trial. It is therefore present for consideration by every jury exercising its discretion to impose death for felony murderers. The opportunities for the arbitrary and capricious imposition of the death penalty are as rampant under this system as they were at the time of *Furman.*

Not only did Tenn. Code Ann. § 39-2-203(i)(7) fail to provide any "genuine narrowing" or "principled basis" upon which the jury could have distinguished among first degree murderers, it automatically and unconstitutionally placed "a thumb on death's side of the scale." *Stringer v. Black,* 112 S. Ct. at 1137. Tennessee is a weighing state. (See discussion *supra* at Section II. A.) The finding of the felony murder aggravating circumstance merely

repeated an element of the underlying offense of first degree murder that the jury had already found. This same element was then placed on the scale to be weighed by the jury. In addition, because Tennessee law required a defendant to prove that mitigation outweighed any aggravating circumstances, the felony murder aggravating circumstance automatically made death the presumptive sentence, unless and until the defendant could prove that he should live. Thus, at sentencing, *every* felony-murderer (including every accomplice) was required to convince a jury that he should live by proving mitigating circumstances sufficient to outweigh the aggravating circumstance. Conversely, even a principal premeditated murderer was not saddled with such an awesome burden absent proof by the state of an additional aggravating circumstance not encompassed by the definition of the underlying crime of first degree murder.

The Tennessee Supreme Court correctly held as a matter of Tennessee law, as a matter of Article I, § 16 jurisprudence, and as a matter of Eighth Amendment jurisprudence that the felony-murder aggravating circumstance, as applied to Donald Middlebrooks, failed to provide a rational basis for treating all felony murderers more severely than all premeditated murderers for purposes of capital punishment.[25]

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[25] The failure of the felony-murder *simpliciter* aggravating circumstance to genuinely narrow the class of death-eligible offenders is highlighted by the fact that Tennessee was the only jurisdiction in the nation to permit the draconian sentencing result which occurred here. Tennessee took the fact of a felony murder *simpliciter ipso facto* made that offense a death-eligible first-degree murder, *then* made that death-eligible offense automatically subject to the death penalty, and still further—by requiring the defendant to prove that mitigation outweighs aggravation before a life sentence can be imposed—made the death penalty the automatic sentence, absent proof of mitigation sufficient to outweigh the automatic aggravating circumstance. This procedure—unique to Tennessee, and since repealed—simply does not comport with the "evolving standards of decency that mark the progress of a maturing society." *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. at 2953 *quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). The former Tennessee scheme stands in isolation in permitting such a harsh sentencing procedure, which makes death the presumptive sentence for felony-murder *simpliciter*, *see* App. B.

"[T]his Court has acknowledged its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977). In evaluating such evolving standards, this Court has primarily looked to the judgments of the State Legislatures. *See Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 2975 (1989); *Penry*, 109 S.Ct. at 2953. Today, thirty-three (33) States and the District of Columbia do not permit capital punishment for the conviction of a party for felony murder *simpliciter* involving kidnapping. Eighteen (18) States would permit the death penalty as a possible punishment under such circumstances. Of those eighteen States, however, only three (3) would automatically elevate a party defendant to be "subject to the death penalty." Of those three States, none make the death penalty the presumptive sentence, because the jury is not instructed that it must impose the death penalty, absent mitigation.

Thus, not one of the States would permit the imposition of the death sentence in the manner in which Tennessee imposed it upon Donald Middlebrooks. Even today, Tennessee has evolved to the position that a felony murder *simpliciter* is no longer a criminal offense. Tennessee also no longer makes death the presumed punishment upon a finding of a statutory aggravating circumstance. The state must now prove that the statutory aggravating circumstance outweighs the mitigating circumstances. Tenn. Code Ann. § 39-13-204(g)(1)(B) (1992).

Petitioner and *amici* contend that this Court's rulings in *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987) provide all of the narrowing that is required under the Eighth Amendment and that the Tennessee Supreme Court erred in requiring more. But nothing in *Enmund* or *Tison* overrules or obviates the "narrowing requirement" that has been reiterated in this Court's cases from *Zant* to *Arave*.[26] The

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[26] *Zant v. Stephens*, 462 U.S. at 878 ("they circumscribe the class of persons eligible for the death penalty."); *Barclay v. Florida*, 463 U.S. at 960, Stevens, J., concurring ("genuinely narrow[ing] the class of persons eligible for the death penalty"); *Blystone v. Pennsylvania*, 494 U.S. 299, 306-7 (1990) ("The presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants . . ."); *Lowenfield v. Phelps*, 484 U.S. at 244:

Enmund and *Tison* decisions establish a minimum level of culpability beneath which the death penalty may never constitutionally be imposed on accomplices to murder. The State of Tennessee cannot be " 'genuinely narrow[ing] the class of defendants eligible for the death penalty,' " *Arave*, 113 S.Ct. at 1542, *quoting Zant*, 462 U.S. at 877, by requiring proof of this constitutionally mandated minimum *mens rea* for the imposition of the death penalty on an accomplice, if indeed it has done even that.[27]

The function of the *Enmund/Tison* requirement and of the "narrowing" requirement are distinct, and both must be independently satisfied. *Enmund* and *Tison* exclude some murderers altogether from the potential reach of the death penalty. The "narrowing" requirement is focused on those that remain, in order to assure that the persons actually sentenced to die are selected from among them in an even-handed, nonarbitrary and rational manner.[28]

Petitioner and *amici* further argue that whether or not the felony murder aggravating circumstance itself actually

("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion.").

[27] As noted *supra*, fn. 2 & 12, the 1989 amendment adding recklessness as an element of first-degree felony murder was not in effect at the time of Middlebrooks' trial, and his jury was not instructed that it needed to make any finding as to intent other than that the offender intended to commit the underlying felony of kidnapping. There has been no finding at any stage thus far that Middlebrooks acted with the degree of intent necessary under *Enmund* and *Tison*.

[28] Petitioner and *amici*'s arguments also ignore this Court's Eighth Amendment jurisprudence on the role of aggravating circumstances. In *Maynard v. Cartwright*, *supra*, this Court affirmed the ruling of the Court of Appeals invalidating the sentence of death based on a vague aggravating circumstance. There was no question that Cartwright met the *Tison/Enmund* standard since he was the actual killer. *See also Walton v. Arizona*, *supra*; *Sochor v. Florida*, *supra*; *Arave v. Creech*, *supra*; *Stringer v. Black*, *supra*; *Lewis v. Jeffers*, *supra*, all of which involved murderers who clearly met the *Tison/Enmund* standard and where this Court considered the effect of aggravating circumstances in identfying those who were actually sentenced to die.

performs any narrowing function is irrelevant for Eighth Amendment purposes because the system as a whole provides adequate procedural protections to insure against the arbitrary and capricious imposition of the death penalty.[29] These arguments ignore the repeated holdings of

[29] The *amicus* brief of California's and 23 other states' Attorneys General implies that the finding of the heinous, atrocious and cruel aggravating circumstance in this case provides all of the narrowing required by the Eighth Amendment. *Amici* present a hypothetical case in which *only* the heinous, atrocious, and cruel aggravating circumstance was used to authorize a death sentence for a felony murderer, and they argue the supposed anomaly of allowing capital punishment in that situation but not in Middlebrooks'. Attorneys General's Brief, pp. 11-12.

This argument is specious because it misrepresents what the Tennessee Supreme Court held in *Middlebrooks*. The Tennessee Supreme Court did not hold that the death penalty was unavailable, or even inappropriate, for Donald Middlebrooks. It did not resentence Middlebrooks to life imprisonment but rather ordered "this case to be remanded for resentencing"—that is, for a new penalty proceeding "where the State will be free to reseek the death penalty if it so desires." *Middlebrooks*, 840 S.W.2d at 347. All that the Tennessee Supreme Court held is that, because the jury instructions at *this* penalty proceeding authorized the jury to sentence Middlebrooks to death if it found that the felony murder aggravating circumstance alone outweighed the circumstances in mitigation, "we are unable to conclude that the elimination of the [felony murder] aggravating circumstance . . . is harmless error beyond a reasonable doubt." *Id.* The whole purpose of its remand is to assure that, if Middlebrooks is to be sentenced to death, his death sentence *will* be rested upon a weighing of the heinous, atrocious and cruel aggravating circumstance against mitigation, *not* upon a weighing of the felony murder aggravating circumstance against mitigation.

Such a remand is based on long-standing Tennessee practice. The Tennessee Supreme Court has consistently refused to reweigh aggravation against mitigation or to hold that a jury's consideration of an invalid aggravating circumstance is harmless error when the jury might have based its death verdict solely on that aggravating circumstance. *State v. Moore*, 614 S.W.2d 348 (Tenn. 1981); *State v. Pritchett*, 621 S.W.2d 127 (Tenn. 1981). This practice is entirely consistent with the Eighth Amendment, *Sochor v. Florida*, 112 S. Ct. 2114, 2123 (1992), and reflects the Tennessee Supreme Court's view of its own responsibilities for insuring regularity in capital sentencing under both state law and the state and federal

this Court that in "weighing" states such as Tennessee, every aggravating circumstance upon which the jury was authorized to rely exclusively in imposing a death sentence upon a particular defendant must meet the "fundamental constitutional requirement" of "channeling and limiting the sentencer's discretion" so as to minimize "the risk of wholly arbitrary and capricious action." *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988). *See, id.* at 365; *Stringer v. Black, supra*, 112 S. Ct. at 1139-1140; *Sochor v. Florida, supra*; *Espinosa v. Florida*, 505 U.S. ——, 112 S. Ct. 2926, 2928 (1992); *Zant v. Stephens*, 462 U.S. at 876 ("This conclusion rested, of course, on the fundamental requirement that *each* statutory aggravating circumstance must satisfy a constitutional standard derived from the principles of *Furman* itself.") (emphasis supplied). In *Arave v. Creech, supra*, this Court addressed the constitutional narrowing function of the "utter disregard for human life" aggravating circumstance, despite the presence of four other statutory aggravating circumstances that were not constitutionally challenged.

The conclusion of the Tennessee Supreme Court that the invalidity of one aggravating circumstance submitted to Donald Middlebrooks' jury as a sufficient basis for a death sentence so infects his sentencing process as to require a resentencing is decisive. The Tennessee Supreme Court has decided that it does not "reweigh" or conduct harmless error analysis in this situation. It is irrelevant what other procedural protections may exist if the Tennessee Supreme Court finds that they have not sufficiently regulated the sentencing process in the particular case at bar.

Petitioner and *amici* contend that the Tennessee Supreme Court was mistakenly concerned with the fact that

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constitutions. On remand, if a properly instructed jury finds that Donald Middlebrooks' case is as deserving of the death penalty as the hypothetical case, nothing in the Tennessee Supreme Court decision below will preclude such a death sentence based upon "the aggravating circumstance of the murder being especially heinous, atrocious or cruel." *Middlebrooks*, 840 S.W.2d at 347.

the elements of the aggravating circumstance "duplicate" the elements of the underlying felony murder conviction. This contention confuses the reasoning of the Tennessee Supreme Court under Article I, § 16 of the Tennessee Constitution with the reasoning of its alternative Eighth Amendment holding. "Duplication," in and of itself, was found sufficient to offend Article I, § 16 of the Tennessee Constitution:

> Our legislature, however, has seen fit to prohibit such duplication by statute in non-capital sentencing, *see* Tenn. Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990), and we are of the opinion that Article I, § 16 of the Tennessee Constitution prohibits such duplication in capital sentencing as well.

State v. Middlebrooks, 840 S.W. 2d at 341, App. to Cert. A 49-50. However, in the Tennessee Supreme Court's "narrowing" analysis, "duplication" was not significant in its own right but only because its *result* was to permit the indiscriminate imposition of death sentences on felony murderers and not on premeditated murderers with no genuine narrowing:

> The perverse result of the felony murder narrowing device is even more troubling because the usual class of first-degree murderers is made up largely of two groups of defendants—felony murderers and premeditated murders. The only defendants who are eliminated by the felony murder narrowing device are those who kill with premeditation and deliberation—i.e., in cold blood—but not during the course of a felony. A simple felony murder unaccompanied by any other aggravating factor is not worse than a simple, premeditated, and deliberate murder. If anything, the latter, which by definition involves a killing in cold blood, involves more culpability.

Middlebrooks, supra at 345, App. to Cert. A 58. Thus, for Eighth Amendment purposes, the Tennessee Supreme Court was concerned with the unprincipled—"perverse"—result of duplication for purposes of enhancement, not the mere fact that the elements are duplicated. Its concern, quite properly, was with the lack of any "principled

basis," *Arave* v. *Creech*, 113 S. Ct. at 1542, for exposing felony murderers to a death sentence with no additional findings of aggravation that serve a genuine narrowing function.

CONCLUSION

Certiorari should be dismissed for want of jurisdiction because the decison below rests upon an adequate and independent state ground. Alternatively, the judgment of the Tennessee Supreme Court should be affirmed.

Respectfully submitted,

DAVID C. STEBBINS *
PAUL R. BOTTEI
704 18th Avenue South
Nashville, Tennessee 37203
(615) 256-9780

LIONEL R. BARRETT, JR.
LIONEL R. BARRETT, JR., P.C.
Washington Square Two
Suite 1417
222 Second Avenue, North
Nashville, Tennessee 37201
(615) 254-1471
Counsel for Respondent

* Counsel of Record

APPENDICES

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . .

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."

* * * *

United States Constitution, Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

* * * *

United States Constitution, Fourteenth Amendment: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

* * * *

28 U.S.C. § 1257 (1988). State courts; certiorari:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is spe-

cially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * * *

Tennessee Constitution, Article I § 16: "Restrictions on bail, fines, and punishment. That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Tennessee Code Annotated § 39-2-201 (1982) Murder generally: "If any person of sound memory and discretion, unlawfully kill any reasonable creature in being, and under the peace of the state, with malice aforethought, either express or implied, such person shall be guilty of murder.

* * * *

Tennessee Code Annotated § 39-2-202 (1982) First-degree murder:

(a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death or imprisonment for life.

(c) Murder in the first degree is a Class X felony.

* * * *

Tennessee Code Annotated § 39-2-203 (1982) Sentencing for first-degree murder:

(a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of

murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows * * *

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows * * *

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; and

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons with the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empaneled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first-degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment.

Tennessee Code Annotated § 39-2-206 (1982) Punishment of accessory before the fact of first-degree murder: Any person tried and convicted as an accessory before

the fact of murder in the first degree shall be punished by life imprisonment or by death under the provisions of §§ 39-2-202 - 39-2-205 and said trial and sentence shall not depend on when or if the principal is convicted nor on the punishment actually imposed on said principal.

* * * *

Tennessee Code Annotated § 39-2402 (1955) Murder in the first degree. Every murder perpetrated by means of poison, lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, or larceny, is murder in the first degree.

* * * *

Tennessee Code Annotated § 39-2402 (1975) Murder in the first degree. An individual commits murder in the first degree if:

(1) he commits a willful, deliberate, malicious and premeditated killing or murder;

(2) he commits a willful, deliberate, and malicious killing or murder, and:

(a) the victim is an employee of the department of correction having custody of the actor,

(b) the victim is a prison inmate in custody with the actor,

(c) the victim is known to the actor to be a peace officer or fireman acting in the course of his employment,

(d) the victim is a judge acting in the course of his judicial duties,

(e) the victim is a popularly elected public official,

(f) the offense is committed for hire; or

(g) the offense is committed while attempting to evade law enforcement officials;

(3) he hires another to commit a willful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim; or

(4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

Tennessee Code Annotated § 40-35-114 (1991) "Enhancement factors.—If appropriate for the offense, enhancement factors, if not themselves essential elements of the offense as charged in the indictment, may include:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(3) The offense involved more than one (1) victim;

(4) The victim of the offense was particularly vulnerable because of age or physical or mental disability;

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

(10) The defendant had no hesitation about committing a crime when the risk to human life was high;

(11) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant had previously been convicted of a felony that resulted in death or bodily injury;

(12) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

(13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

(A) Bail, if the defendant is ultimately convicted of such prior felony;

(B) Parole;

(C) Probation;

(D) Work release; or

(E) Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority;

(14) The felony was committed on escape status or while incarcerated for a felony conviction;

(15) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense; or

(16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

* * * *

Tennessee Code Annotated § 40-35-111 (1982) Enhancement factors.—If appropriate for the offense, enhancement factors, if not themselves necessary elements of the offense charged in the indictment or one of the criteria for establishing an especially aggravated offense may include:

(1) The defendant has a previous history of criminal convictions or criminal behavior;

(2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(3) The offense involved more than one victim;

(4) A victim of the offense was particularly vulnerable because of age or physical or mental disability;

(5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(9) The defendant possessed or employed a firearm, explosive device, or other deadly weapon during the commission of the offense; or

(10) The defendant had no hesitation about committing a crime when the risk to human life was high.

* * * *

Tennessee Rule of Criminal Procedure 12.3(b):

"Where a capital offense is charged in the indictment or presentment and the district attorney intends to ask for the death penalty, written notice thereof shall be filed not less than thirty (30) days prior to trial. . . . The notice shall specify those aggravating circumstances the State intends to rely upon at a sentencing hearing. . . ."

APPENDIX B

FELONY-MURDER SIMPLICITER INVOLVING UNDERLYING KIDNAPING: MAXIMUM PUNISHMENT FOR A PARTY TO THE OFFENSE

Not Murder Under State Law	Less Than Life to Life	Life With Parole Mandatory & Maximum	Life Without Parole Mandatory & Maximum	Death-Eligible Offense	Automatic Subject To Jury Discretion To Impose Death	Death Penalty Presumed, Unless Mitigation Proven
	[illegible][1]					
	[illegible]					
	[illegible]			Arizona[3]		
	Arkansas[4]					
				California[5]		
				Colorado[6]		
	Conn.[7]					
Delaware[8]						
	D.C.[9]				—	
					Florida[10]	
					Georgia[11]	
Hawaii[12]						
				Idaho[13]		
				Illinois[14]		
	Indiana[15]					
	Iowa[16]					
		Kansas[17]				
Kentucky[18]						
			Louisiana[19]			

Not Murder Under State Law	Less Than Life to Life	Life With Parole Mandatory & Maximum	Life Without Parole Mandatory & Maximum	Death-Eligible Offense	Automatic Subject To Jury Discretion To Impose Death	Death Penalty Presumed, Unless Mitigation Proven
	Maine[20]					
				Maryland[21]		
		Mass.[22]				
Michigan[23]						
	Minnesota[24]					
				Miss.[25]		
	Missouri[26]					
				Montana[27]		
				Nebraska[28]		
				Nevada[29]		
N. H.[30]						
	N. J.[31]					
				N. M.[32]		
	New York[33]					
				N. C.[34]		
	N. Dakota[35]					
Ohio[36]						
				Oklahoma[37]		
	Oregon[38]					
		Penn.[39]				

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No Murder Under State Law	Less Than Life to Life	Life With Parole Mandatory & Maximum	Life Without Parole Mandatory & Maximum	Death-Eligible Offense	Automatic Subject To Jury Discretion To Impose Death	Death Penalty Presumed, Unless Mitigation Proven
		R. I.[40]				
					S. C.[41]	
				S. Dakota[42]		
Tennessee (current)[43]						
						Tennessee (old)[44]
	Texas[45]					
	Utah[46]					
	Vermont[47]					
	Virginia[48]					
	Wash.[49]					
		W. Va.[50]				
	Wisconsin[51]					
				Wyoming[52]		

[1] Ala. Code § 13A-5-40 (capital murder requires intentional killing); *Russaw v. State*, 572 So. 2d 1288 (Ala. Cr. App. 1990); Ala. Code § 13A-6-2(a)(3) (felony murder simpliciter is murder); Ala. Code § 13A-5-6 (sentencing for offense of murder)

[2] Ak. Stats. § 11.41.100 (felony-murder is second-degree murder); Ak. Stat. § 12.55.125 (sentencing statute)

[3] Ariz. Rev. Stat §§ 13-1105(A)(2) (felony murder simpliciter is first-degree murder); 13-703 (no felony murder aggravating circumstance in capital sentencing)

[4] Ark. Code § 5-10-101(a)(2) (capital felony murder requires major felony and extreme indifference to value of human life); Ark. Code § 5-10-102(a)(1) (first-degree murder requires other felony and extreme indifference to value of human life); Ark. Code § 5-4-401 (sentencing for first-degree murder)

[5] Cal. Penal Code § 187(a) (murder requires malice); *See however* Cal. Penal Code § 190.2(a)(17)(ii) (felony murder kidnaping special circumstance); Cal. Penal Code § 190.2(c) (to apply felony murder aggravating circumstance to accomplice who did not kill, State must prove intent to kill); Cal. Penal Code § 190.2(b) (to apply felony murder aggravating circumstance to actual killer, no intent to kill need be proven); *People v. Anderson*, 285 Cal. Rptr. 523 (felony-murder simpliciter is first-degree murder); Cal. Penal § 190.3 (jury to impose death if it concludes that aggravation outweighs mitigation)

[6] Col. Rev. Stat. § 18-3-102(1)(b) (felony murder simpliciter is first-degree murder); Col. Rev. Stat. § 16-11-103(5)(d) (felony murder aggravating circumstance requires intent to kill)

[7] Conn. Gen Stat. § 53a-54b, § 53a-54a (felony murder is not a capital felony; capital felony requires intent to kill); Conn. Gen. Stat. § 53a-54c (felony murder simpliciter is murder); Conn. Gen. Stat. §§ 53a-45, 53a-35a (murder punished by 25 years to life)

[8] Del. Code Ann. § 636 (felony first-degree murder requires major felony and recklessness); Del. Code Ann. § 635 (felony second-degree murder requires lesser felony and criminal negligence); *Id.* (sentence for felony-second degree murder at least 10 years).

[9] D.C. Code § 22-2401 (felony-first degree murder requires killing in course of felony without purpose to cause death); D.C. Code § 22-2404 (sentencing for murder)

[10] Fla. Stat. § 782.04(1)(a)(2) (felony-murder simpliciter is capital felony); Fla. Stat. § 921.141(5)(d) (kidnaping felony murder aggravating circumstance); Fla. Stat. § 921.141(3) (sentence imposed by judge after weighing aggravating circumstances and mitigating circumstances)

[11] O.C.G.A. § 16-5-1(c), (d) (felony-murder simpliciter punishable by life imprisonment or death); O.C.G.A. 17-10-30 (jury given discretion to impose death sentence if it finds one aggravating circumstance)

[12] Haw. Rev. Stat. §§ 707-701, 707-701.5 (murder statutes)

[13] Id. Code § 18-4003(d) (felony-murder is first-degree murder); *State v. Windsor*, 110 Idaho 410 (1985) (felony first-degree murder does not require intent to kill); Id. Code § 19-2515(g)(7) (felony-murder aggravating circumstance requires intent to kill)

[14] 720 Ill. Comp. Stat. Ann. § 9-1(a)(3) (causing death in course of forcible felony is first-degree murder); 720 Ill. Comp. Stat. Ann. § 9-1(b)(6)(b) (felony murder aggravating circumstance requires intent to kill and actual killing by accused)

[15] Burns Ind. Code § 35-42-1-1(2) (killing in course of major felony is murder and subject to death penalty); Burns Ind. Code § 35-42-1-4 (killing in course of minor felony is involuntary manslaughter); Burns Ind. Code § 35-50-2-9(b)(1) (felony-murder aggravating circumstance requires intentional killing)

[16] Ia. Code §§ 707.1, 707.2.2 (first-degree felony murder requires malice); Ia. Code § 707.5 (felony murder sentencing statute)

[17] Ks. Stat § 21-3401(a)(3) (murder is killing in course of felony); Ks. Stat. § 21-4501 (sentencing for murder).

[18] No felony murder in Kentucky. *See* K.R.S. § 507.020 (1992)

[19] La. Rev. Stat. § 14:30.1.A.2 (felony murder simpliciter is second degree murder); La. Rev. Stat. § 14:30.1 (punishment for second degree murder)

[20] 17A Me. Rev. Stat. § 202.1 (felony murder simpliciter statute) 17A Me. Rev. Stat. § 1251 (sentencing statute)

[21] Md. Code Art. 27 §§ 407-410 (felony murder is first-degree murder); *Evans v. State*, 28 Md. App. 640 (1975) *aff'd* 278 Md. 197 (1976) (felony murder does not require intent to kill); *See* Md. Code Art. 27 § 413(d)(10) (felony-murder aggravating circumstance does not include kidnapping as underlying felony)

[22] Mass. Gen. Laws Ch. 265 § 1 (felony murder is murder); Mass. Gen. Laws Ch. 265 § 2 (felony murder punishable by life imprisonment)

[23] *People v. Aaron*, 409 Mich. 672 (1980) (felony-murder simpliciter abolished)

[24] Minn. Stat. Ann. § 609.19(2) (felony murder simpliciter for major felonies other than criminal sexual conduct)

[25] Miss. Code § 97-3-19 (killing in course of major felony is capital murder, killing in course of minor felony is simple murder). While murder in course of felony is aggravating factor for capital murder, jury must find that defendant killed, attempted to kill, intended to kill, or contemplated the use of lethal force. Miss. Code § 99.19-101(5)(d), (7).

[26] Vernon's Ann. Mo. Stats. § 565.021.1(2) (felony murder simpliciter is second-degree murder); Vernon's Ann. Mo. Stats. § 558.011 (sentencing provision, 10-30 years or life)

[27] Mont. Code Ann. § 45-5-102 (causing death in course of felony is deliberate homicide); Mont. Code Ann. § 46-18-303 (no felony-murder aggravating circumstance for deliberate homicide)

[28] Neb. Rev. Stat § 28-303 (felony murder simpliciter is first-degree murder); *State v. Rust*, 223 Neb. 150 (1986) (felony murder does not require intent); Neb. Rev. Stat. § 29-2523 (no felony-murder aggravating circumstance)

[29] *Compare* Nev. Rev. Stat. § 200.010 (murder requires malice) *and* § 200.030(1)(b) (murder in course of felony is murder in the first-degree) *with Ford v. State*, 660 P.2d 992 (Nev. 1983) (felony-murder requires no mens rea); Nev. Rev. Stat. § 200.033.4 (felony-murder aggravating circumstance requires that the defendant have killed or have knowledge that killing would occur)

[30] N.H. Stat. Ann. § 630:1-b (felony murder requires recklessness or extreme indifference to value of human life)

[31] N.J. Stat. Ann. § 2C:11-3.a(3) (felony murder simpliciter is murder); N.J. Stat. Ann. § 2C:11-3.b (sentence for felony-murder is 30 years to life)

[32] N.M. Stat. § 30-2-1.A(2) (killing in course of felony is capital felony); N.M. Stat. § 31-20A-5.B (felony-murder aggravating circumstance requires intent to kill in course of kidnaping or criminal sexual contact with minor)

[33] N.Y. Penal Code § 125, § 125.25.3 (felony murder simpliciter is second degree murder); N.Y. Penal Code § 70.00 (sentencing for second degree murder)

[34] N.C. Gen Stat. § 14-17 (felony murder is first-degree murder); *State v. Cherry*, 298 N.C. 86 (1979) (felony-murder aggravating circumstance cannot be applied to felony-murder conviction)

[35] N. D. Cent. Code § 12.1-16.01.1.C (felony murder is Class AA felony); N. D. Cent. Code § 12.1-32-02 (sentencing statute)

[36] Oh. Rev. Code Ann. § 2903.01 (aggravated murder requires intent to kill); Oh. Rev. Code § 2903.04(A) (killing in course of felony is involuntary manslaughter)

[37] Ok. Stat. Ann. Tit. 21 § 701.7.B (felony murder simpliciter is first-degree murder); Okla. Stat. Ann. Tit. 21 § 701.12 (no felony murder aggravating circumstance)

[38] Ore. Rev. Stat. §§ 163.095(d), 163.115(1)(b) (felony murder simpliciter is simple murder); Ore Rev. Stat. § 63.115(3)(a) (murder punishable by 10 years to life)

[39] Purdon's Pa. Stat. Tit. 18 § 2502 (felony-murder simpliciter is second-degree murder); Purdon's Pa. Stat. Tit. 18 § 1102(b) (sentencing for second-degree murder)

[40] Gen. Laws R.I. § 11-23-1 (killing with malice is murder; murder in course of felony is first-degree murder); Gen. Laws R.I. § 11-23-2 (sentencing statute)

[41] S.C. Code § 16-3-10 (murder requires malice) *But see State v. Yates*, 280 S.C. 29, 310 S.E.2d 85 (1982) (acknowledging common law rule of felony murder); S.C. Code § 16-3-20 (jury must consider aggravation and mitigation in assessing sentence)

[42] S.D. Cod. Laws § 22-16-1, -2, -4 (killing in course of major felony is first-degree murder, killing in course of minor felony is second-degree murder); S.D. Cod. Laws § 23A-27A-1 (no felony murder aggravating circumstance)

[43] Tenn. Code Ann. § 39-13-202 (1989) (felony murder requires reckless killing)

[44] Tenn. Code Ann. § 39-2-203(f), (g) (1982); *See State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992).

[45] Tex. Penal Code § 19.02 (felony murder simpliciter is simple murder)

[46] Utah Code § 76-5-202, 203 (felony-murder simpliciter is second degree murder); Utah Code § 76-3-203 (sentencing provisions)

[47] Vt. Code Tit. 13 § 2301, 2311 (killing in course of felony is first-degree murder); Vt. Code Tit. 13 § 2303 (sentencing provisions for first-degree murder)

[48] Va. Code § 18.2-32 (felony-murder simpliciter is first-degree murder, not capital murder)

[49] Wash. Code § 9A.32.030(1)(C) (felony murder simpliciter is first-degree murder, not aggravated murder)

[50] W. Va. Code § 61-2-1 (murder in course of felony is first-degree murder); W. Va. Code § 61-2-2 (sentence for murder is life imprisonment)

[51] Wis. Crim. Code §§ 940.03 (felony murder simpliciter an offense punishable by 20 years to life)

[52] Wyo. Code § 6-2-101 (killing in course of felony is first-degree murder); *Engberg v. Meyer*, 820 P.2d 70 (Wyo. 1991) (felony murder aggravating circumstance cannot be applied to felony murder conviction)